(1) Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

JOSEPH R. EVANNS,
Petitioner,

v.

AT&T CORPORATION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit erred in holding, directly contrary to the holding of the District of Columbia Circuit in the MCI et al v. FCC, 209 F.3d 760 (D.C.Cir. decided 4/28/00) brought to the attention of the Ninth Circuit prior to its decision herein, and contrary to the policy and rules of the Federal Communications Commission that the Filed Rate Doctrine can continue to be used by carriers as a complete defense to actions seeking relief from unlawful charges to telephone customers?

2. Must the Ninth Circuit decision herein be reversed in light of the recent opinion by the FCC (F.C.C.R. 17, 022 Sections 9,8,39) which decision reiterates the inapplicability and unviability of the filed-rate doctrine in a related telecommunications field?

3. Whether the Ninth Circuit erred in holding that defendant Pacific Bell, which admittedly made no rate filings with the FCC, could invoke the Filed Rate Doctrine as a complete defense to actions seeking relief from unlawful charges to customers?

4. Whether the Ninth Circuit erred in holding on the basis of the Filed Rate Doctrine contrary to Federal Communications Commission policies, rules and regulations, that long distance telephone carriers may pass on to consumers a charge (designated by the FCC as the Universal Service Fund charge) and levied by the FCC upon carriers (and not upon consumers), without fully disclosing to the paying customers, the full nature of this charge, that carriers are not required by law to pass this charge on to the consumers but do so at their option only, that the USF charge is not a government tax or fee, and that in fact some carriers have opted not to pass the USF charge to their customers?

5. Whether the Ninth Circuit erred in holding, directly contrary to the holding of the appellate court in California, Day v. AT&T Corp., 63 Cal.App. 4th 325 (1998), that the Filed Rate Doctrine bars actions against carriers under the California State Consumer Protection Law when, as in the instant case, the complained-of conduct by the carrier does not involve charges for services provided to the customer? (Subsequently, a second California appellate court reaffirmed the Day decision, Spielholtz v. Superior Court, No. B131655, filed 2/08/01, certified for publication California Court of Appeal, Second Appellate District).

6. Whether the Ninth Circuit erred in affirming the district judge's denial of plaintiff's motion to remand the cause back to the California Superior Court where it was originally filed by plaintiff, when there was no dispute between the parties that the district court was not the proper forum for the cause, the plaintiff's position being that the California Superior Court was the proper forum and the defendants' position being that the Federal Communications Commission was the proper forum?

7. Whether the Ninth Circuit erred in affirming the district judge's dismissal of the entire cause as barred by the Filed Rate Doctrine when the district judge acknowledged that there were elements of the cause that arose under California State law and did not present federal issues?

8. In affirming the district judge's refusal to remand the cause to Los Angeles Superior Court where it was originally filed by plaintiff, did the Ninth Circuit err in ignoring the collateral estoppel effect of a case with similar issues and the same defendants which was remanded to California Superior Court by the District Court for the Central District of California prior to the decision herein?

9. Did the Ninth Circuit err in affirming the district judge's dismissal of the original unamended complaint without leave to amend though plaintiff requested leave to amend under Rule 15, F.R.Civ.P., when the district judge acknowledged that there were elements of the case that arose under California State law not subject to the Filed Rate Doctrine defense?

10. Did the Ninth Circuit err in not addressing plaintiff's argument that the USF charge levied upon the carriers by the FCC violates the United States Constitution and the collection from customers and disbursement thereof by the carriers from customers is a fortiorori unlawful on at least the following grounds:

(a) The USF charge and collection constitute "unlawful takings" under the Fifth Amendment to the Constitution of the United States pursuant to this Court's decision in Eastern Enterprises v. Apfel, Commissioner of Social Security, __US__, 118 S.Ct. 2131 (1998);

(b) The USF charge and collection are unlawful because they constitute a tax not legislated by Congress, nor do they constitute a regulatory fee;

(c) The USF charge constitutes an unlawful bill of attainder, pursuant to this Court's decision in U.S. v. Lovett, 328 US 303 (1965) in that it unlawfully singles out a specific group of people (long distance carriers and their customers) who must bear the cost of the FCC's programs funded by the USC;

(d) The USF charge on telephone calls abroad violates the Constitutional prohibition against taxes or duties on exports pursuant to this Court's decision in United States v.

United States Shoe Corporation, __U.S.__, 118 S.Ct. 1290 (1998);

(e) The USF scheme is beyond the authority of the FCC in that at least a key element thereof, the independent subsidiary corporation formed to collect and disburse USF funds, is beyond the FCC's authority as delegated by Congress, pursuant to this Court's decision in Hampton v. United States, 276 U.S. 394, (1928);

(f) The USF is unconstitutional because it attempts to dispose of federal property (i.e. USF revenues disbursed by or on behalf of the FCC) without Congressional control in violation of Article IV, Section 3 of the Constitution; and

(g) The pass-through to the public of the USF charge is an unlawful violation of due process under the Fifth Amendment of the Constitution in that a consumer who pays the carriers' bill for long distance services but not the USF charge will have service cut off without a hearing and thus lose a valuable property right for a charge bearing no legitimate interest in regard to telephone service?

11. Whether the Ninth Circuit erred in affirming the district judge's denial of entry of default against the defendant removing parties who filed their answer in the form of a Rule 12(b)(6) motion to dismiss three days late per Rule 81(c), F.R. Civ. P., which governs answers in removed actions, on the basis of an erroneous application of Rule 6, F.R.Civ.P., extending the time for defendants' pleading, though Rule 6 explicitly applies only to situations wherein a period of eleven (11) days or less is provided for response, whereas Rule 81(c), F.R. Civ. P. provides a response period of at least twenty (20) days?

12. Whether the Ninth Circuit erred in affirming the imposition of sanctions on plaintiff's counsel for requesting that default of the defendant removing parties be entered when defendants' answer was at least three (3) days late under Rule 81(c), F.R.Civ.P., the district judge stating in open court to plaintiff's counsel, it "was unreasonable and meritless for you to believe that I was going to enter a default against AT&T, even if they had been guilty, so to speak, of filing something a day or two long"?

13. Whether the Ninth Circuit erred in affirming the district judge's taking of judicial notice of defendants' alleged rate filings with the FCC when the alleged copies submitted were incomprehensible, no testimony in the form of declaration or otherwise was proffered as to genuineness or authenticity, and where it turned out that as stated in the case of MCI v. FCC, 209 F.3d 760 (D.C.Cir.2000), the FCC implemented a policy of rejecting rate filings commencing in 1996 prior to the alleged rate filings of which the district judge took judicial notice?

PARTIES TO THE PROCEEDINGS

Petitioner

Joseph R. Evanns. Petitioner is an individual and has no corporate affiliations.

Respondent

Respondents, AT&T, MCI World Telecom and Pacific Bell are corporations.

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OPINION BELOW

The order and memorandum (not for publication) by the United States Court of Appeals for the Ninth Circuit are reprinted in the Appendix hereto [App.1].

The opinion for publication of the United States Court of Appeals for the Ninth Circuit is reprinted in the Appendix hereto [App.2].

JURISDICTIONAL BASIS

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 25, 2000. The Court of Appeals denied a timely petition for rehearing en banc on January 3, 2001. [App.3] This petition for a Writ of Certiorari is filed within ninety days from that date under 28 USC 2101(c). The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS INVOLVED

In Appendix 4 are set forth the following in pertinent part.

U.S. CONSTITUTION

(1) Constitution, Article I, Sec. 8, Cl.2;
(2) Constitution, Article I, Sec. 9, Cl.3;
(3) Constitution, Article I, Sec. 9, Cl.5;
(4) Constitution, Article IV, Sec. 3.

FEDERAL STATUTES

(5) 28 USC Sec. 1447
(6) 47 USC Sec. 151
(7) 47 USC Sec. 152
(8) 47 USC Sec. 209
(9) 47 USC Sec. 254
(10) 47 USC Sec. 414

STATE STATUTES

(11) California Business & Professions Code, Section 17203;
(12) California Business & Professions Code, Section 17533.6;
(13) California Business & Professions Code, Section 17535

FEDERAL REGULATIONS

(14) 47 CFR 54.205
(15) 47 CFR 54.703
(16) 47 CFR 69.5
(17) 47 CFR 69.116
(18) 47 CFR 69.604
(19) 47 CFR 69.616

FEDERAL REGISTER

(19) P. 32 931, Vol. 62

STATEMENT OF THE CASE

On July 10, 1998, Plaintiff filed an action on behalf of the public in the California Superior Court for Los Angeles County seeking (among other forms of relief) to bar collection of funds by the defendant telephone carriers from their customers to recover assessments levied by the FCC upon the defendant telephone carriers as and for their contributions to the Universal Service Fund (USF). [Exc.5][1]. The defendant telephone companies decided to pass through to their customers the cost of the carriers' mandatory contributions to the USF even though 47 CFR 69.604 specifically prohibits telephone companies from billing and collecting these charges. The defendants, however, attempted to circumvent this prohibition by allegedly filing with the FCC rates (the alleged filing contended by the defendants to be supported by the judicial notice under appeal) which included these charges while failing to inform customers of the true facts, as required by FCC disclosure policies, that the charges were for paying the defendants' USF assessments. On the customers' monthly bills the charges were labeled and described in various ways (depending on the defendants' billing formats) such as the "Federal Universal Service Fee," etc., making it appear as if the government mandated that these charges be paid by the defendants' customers, when in fact these charges were not to be passed through to consumers under FCC regulations. [Excs. 6-10, inclusive].

Defendants were served with process in the period of July 17-20, 1998 and filed a Notice of Removal to the United States District Court for the Central District of California on

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[1] "EXC." citations refer to the Excerpts of Record on file with the Ninth Circuit Court of Appeals in connection with this case.

August 12, 1998 in Los Angeles Superior Court.

The defendants did not file a response by August 17 as required by Rule 81(c), F.R.Civ.P., and on August 20, plaintiff filed his request to enter the defaults of the defendants. This request was rejected by the Office of Clerk of the Central District on the stated technical ground that allegedly a proof of service was not properly attached to the application to enter default. Thereafter, plaintiff requested entry of default once again, and applied to the Court for an order because the Clerk again refused to enter the default, claiming (on unspecified grounds) that only the Judge could enter the default. [Excs. 13,14].

The defendants filed a Motion under Rule 12(b)(6) F.R.Civ.P. to dismiss the complaint on the basis that plaintiff's complaint challenged a filed-rate, that the filed-rate was included in an alleged rate-filing as to which defendants requested the Court to take judicial notice and that filed-rate challenges could only be heard by the FCC. Plaintiff timely filed a motion to remand to Los Angeles Superior Court specifically stating in the motion that it was filed out of an abundance of caution under the 30-day rule of 28 USC 1447(c) and was not to be deemed a waiver of the defendants' defaults. Plaintiff opposed defendants' Rule 12(b)(6) motion on the basis that: plaintiff was not challenging a filed-rate but was invoking California Consumer Protection Statutes, California Business & Professions Code Sec.17200 et seq., to protect telephone customers from being misled concerning the true nature of the USF pass through (i.e. that it is an optional passthrough to consumers of the mandatory assessments imposed upon the carriers by the FCC, as opposed to a government tax or fee required to be paid by the consumer and that some carriers do not opt to pass through the charge to their customers).

Plaintiff based this argument on a California Appellate Court decision Day v. AT&T Corp., 63 Cal. App. 4th 325 (1998), wherein the California Court of Appeal held that the filed-rate doctrine did not bar invoking of the California Consumer Protection Statutes to prevent telephone companies from engaging in non-disclosure of their practice of "rounding up" minutes regarding pre-paid telephone cards.

Plaintiff also contended that the "filed-rate" applied to "rates" for services, not charges unrelated to actual telephone service. Plaintiff also invoked the Savings Clause of the Federal Communications Act (FCA), 47 USC 414 which provides that the FCA does not preempt common law remedies. Plaintiff further argued that defendants were forbidden by FCC Rules and policy from passing through to and collecting from their customers the carriers USF assessments.

Additionally, Plaintiff presented arguments that under California Consumer Laws the defendants' conduct is unlawful in that they collected the USF charge under the guise of governmental authority.

Defendants opposed remand on the ground that the cause, as based on an alleged challenge to a filed-rate, could only be heard by the FCC.

The district judge denied remand, dismissed the complaint without leave to amend, denied the request to enter defendants' default, and imposed sanctions upon plaintiffs' counsel for requesting such entry of default.

On appeal, the parties duly filed their briefs and oral hearing was set for September 14, 2000. In August, 2000, plaintiff filed with the Ninth Circuit a Rule 28(j) F.R.A.P.,

notice regarding decisions subsequent to the briefs. [App.5]. The Rule 28(j) notice referred to two very pertinent cases: (1) MCI World Com, Inc. et al v. Federal Communications Commission and United States of America, 209 F.3d 670 (D.C.Cir.2000); and (2)Myron Blackman and Paul Mediano v. AT&T Corporation, MCI Telecommunications Corporation, Civil No. EDCV 99-0142 RT (VAPx) (C.D. Cal. Eastern Division, decided 3/3/2000). As noted in the 28(j) notice, the D.C. Circuit affirmed the FCC's detariffing policy started in 1996 and held the filed-rate doctrine to be non-viable as well as making telephone carriers and their charges subject to State law.

The Blackman case involved a remand to Superior Court of a case involving the same defendants with similar issues to those in the instant cause.

The Ninth Circuit then issued an order cancelling oral argument. Plaintiff then filed a request for oral argument and proffer of oral argument, in which the arguments stated in the Rule 28(j) notice were expanded upon.

The Ninth Circuit then issued a denial of the Request for Oral Argument and rejected the proffer thereof. On October 25, 2000, the Ninth Circuit issued an order and not-for-publication memorandum affirming the district judge in all respects [App.1]. A timely petition for rehearing en banc was denied January 3, 2001. [App.3].

In neither the decisions nor the opinion of the Ninth Circuit was any mention made of the D.C. Circuit case of MCI v. FCC nor of the Blackman case.

The Ninth Circuit recognized that the plaintiff "did not claim that the defendant carriers have failed to comply with the

terms of their filed tariffs, nor does he claim that the terms of the filed tariffs themselves are unreasonable or unjust. Evanns claims only that the carriers had obligations beyond those set out in their filed-tariffs-to disclose that the assessment set out in the tariffs was a passthrough." [App.2, p.13440 p.21].

The Ninth Circuit reached its conclusion to affirm the District Court on the basis of this Court's decision in American Tel. et al. Co. v. Central Office Tel., Inc., 524 US, 214 (1998), which was a case in which a recovery would have resulted in a lower rate than the filed-rate for customers on whose behalf recovery was obtained. Unlike the situation in Central Telephone, stopping the collection of the USF due to non-disclosure of the true facts of the USF charge as prayed in the complaint herein, would not affect the customer's rates or service.

The Ninth Circuit citation of the Central Office Telephone case was used to support a holding that "the filed-rate doctrine bars all claims State and Federal, that attempt to challenge [the terms of tariffs] that a Federal agency has reviewed and filed." (Emphasis added).

The Ninth Circuit overlooked the following:

(1) There were no rate-filings or reviews by the FCC; and

(2) The USF is not a proper element of a filed rate because it is not a "rate" pertaining to telephone service, but is a flat charge unrelated to usage, and is collected discriminatorily (i.e. from some customers and by some telephone companies and not collected by other telephone companies).

Concerning remand, the Ninth Circuit affirmed denial of remand on the basis that the complaint referred to state and federal law. [App.1, p.3].

No reference was made to the Blackman case and its collateral estoppel effect on the defendants nor was reference made to the Blackman reasoning i.e. the parties' agreement that the Federal Court was an improper forum, the defendants contending the FCC was the proper forum and the plaintiff contending that the Superior Court was the proper forum.

Though the Ninth Circuit recognized that plaintiff's cause did not involve a challenge to a filed rate (see App.2 p.13440 fn.21) the Ninth Circuit ignored controlling law from this Court, Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 103 S.Ct. 2841 (1983), in which this Court held that a case whose removal to district court was affirmed by the Ninth Circuit had to be remanded to Superior Court because the complaint arose under State law even though the parties agreed that the interpretation of a federal statute (ERISA) was vital, on the basis of well-settled law that the interposition of a federal defense, as here, to a state cause of action does not justify removal.

The Ninth Circuit disregarded the issue-preclusive collateral estoppel effect of the Blackman remand, contrary to this Court's leading case of Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1970).

The Ninth Circuit declined to consider important Constitutional issues raised by plaintiff regarding the legitimacy or lack thereof of the USF assessment on the ground that these arguments were not raised in the trial court, contrary

to the holding of this Court in U.S. National Bank v. Independent Insurance Agents, 508 U.S. 439(1993).

The court relied instead on the Ninth Circuit case of Marbled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996), which did not involve Constitutional issues and which stated criteria for consideration on appeal of matters not raised below. It should be noted that these criteria were met by plaintiff in the instant case. This notwithstanding, the Ninth Circuit refused to consider the Constitutional issues raised by plaintiff.

As a result, the Ninth Circuit failed to address basic Constitutional issues surrounding the imposition of the USF on the carriers by FCC rule and the collection thereof from consumers by the carriers.

The Ninth Circuit refused to reverse the district judge's dismissal of the original unamended complaint on Rule 12(b)(6) motion, without leave to amend, though the district judge recognized at least elements of a viable state court cause of action.

This is clearly at variance with this Court's decision in the leading case of Conley v. Gibson, 355 US 41, 78 S.Ct. 99 (1958) and Ninth Circuit precedent in Schreiber Distributing v. Serv-Well Furniture Co., 806 F.2d 1393 (9th Cir.1986).

The Ninth Circuit refused to reverse the district judge's taking of judicial notice of the allegedly filed tariffs of the defendants though the exhibits comprising alleged photocopies of the tariffs were incomprehensible and not supported by any evidence whatsoever as to genuineness and authenticity. Moreover, the panel ignored evidence that since 1996 the FCC had a policy of rejecting tariff filings as set forth in MCI v. FCC, 209 F.3d 670 (D.C.Cir. 2000).

The panel affirmed the district judge's refusal to enter the default of the defendant removing parties, asserting that the defendants timely responded on August 20 whereas under Rule 81(c) governing response time in removed cases, the defendants were in default for not responding on August 17.

The panel relied on a flatly erroneous misreading of Rule 6, F.R.Civ.P. in reaching this result, stating in support of the refusal to enter defendants' default: "See F.R.Civ.P. 81(c) setting out time period for filing responsive pleading in a removed case); F.R.Civ.P. 6(a) (setting out method by which time periods under the rules are to be computed.)" [App.1, p.2].

This attempt to compute time under Rule 81(c) by means of Rule 6(a) is clear error, Rule 6(a)'s saving exclusion of weekends holidays etc. from the time computation being applicable only in situations where "the time prescribed or allowed is less than 11 days" whereas the prescribed time under Rule 81(c) is far more than 11 days ("20 days after service of summons or 5 days after removal, whichever period is longest"). (Emphasis added).

Thus, under the very clear language of the Rules, Rule 6(a) did not operate to save the defendants from default and plaintiff's request to enter default was clearly meritorious; yet, in spite of these considerations the Ninth Circuit affirmed not only the refusal to enter default but also the imposition of sanctions on plaintiff's counsel for advancing in good faith plaintiff's clearly valid position.

REASONS FOR GRANTING WRIT

I.

The Ninth Circuit's extremely expansive reading of the scope and viability of the filed rate doctrine creates an intolerable conflict in the lower courts.

This includes Items Nos. 1-5 and 7 from Questions for Review, supra. By holding that the complaint herein is barred by the filed-rate doctrine, the Ninth Circuit has acted in a manner which directly conflicts with all other United States Courts of Appeals which have ruled on the matter. See MCI et al v. FCC, 209 F.3d 670 (D.C.Cir.2000) and Texas Office of Public Utility Counsel v. Southwestern Bell, 183 F.3d 393 (5th Cir. 1999). The decision in Evanns also conflicts with Federal Communications Commission rules and policies regarding detariffing, competition, and disclosure all aimed at making telephone carriers and their rates subject to State law.

The Ninth Circuit's decision in the case at bar also directly conflicts with decisions of state courts which have passed upon the filed rate doctrine in the geographic area covered by the Ninth Circuit. See Day v. AT&T Corp., 63 Cal. App. 4th 325 (1998), and Spielholtz v. Superior Court, Civil No. B131655, certified for publication Court of Appeal of the State of California Second Appellate District decided 2/08/01 [App.7].

Based on its own very expansive reading of the scope (and continued viability) of the filed-rate doctrine, the Ninth Circuit made the blanket pronouncement that "The filed-rate doctrine bars any claim whether couched in terms of federal or state law, attacking the defendants' collection of the USF in compliance with the terms of the filed tariffs. . . . [Citing

authority] "finding non-disclosure claims to be barred by the filed-rate doctrine." [App.2, p 13440 and fn. 20]. (Emphasis in original).

Thus, in the Ninth Circuit's view, there are no constraints on the conduct of carriers as long as that conduct is contained in the filed-rate. In theory, then, carriers can include any sort of charge or expense in the filed-rate with impunity.

So broad is the scope assigned by the Ninth Circuit to the filed-rate that it in effect was held to protect defendant Pacific Bell which admittedly acted as agent for long distance carriers to collect the USF from customers and acknowledged that it had made no FCC rate filings (a supposed California Public Utilities Commission filing alluded to by Pacific Bell bore an apparent filing date of 1985, long prior to the 1996 genesis of the USF).

However, this draconian interpretation of scope and effect of the filed rate directly conflicts with other federal appellate courts which have considered the matter.

The D.C. Circuit in MCI et al. v. FCC, 209 F.3d 670 (D.C.Cir.2000), held that the FCC had a detariffing policy since 1996 and that in effect there is no longer such a thing as a filed-rate. The D.C.Circuit agreed with the FCC that the Telecommunications Act of 1996 did not grant carriers the right to file tariffs and upheld the FCC's policy and practice of rejecting rate filings.

On July 30, 1999, the 5th Circuit rendered a decision, Texas Office of Public Utility Counsel v. Southwestern Bell, 183 F.3d 393 (5th Cir. 1999) which reversed the FCC's assessment of USF contributions on the carriers though the USF assessments had been (allegedly) incorporated into tariff

filings. Notwithstanding that the defendant carriers are now free of any obligation to pay USF assessments levied by the FCC, the Ninth Circuit in the instant case upheld the defendants' practice of continuing to assess USF charges on their customers.

As a result of the Ninth Circuit's solitary position, an intolerable conflict is presented. Specifically, telephone customers within the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and the territories of Guam and the Northern Mariana Islands now have no choice but to pay the USF charges assessed upon them by the defendants or have their telephone service cut off; however, customers in jurisdictions outside the Ninth Circuit may obtain relief from USF charges and not have their telephone service cut off.

Likewise, this conflict presents a predicament for large national consumers who see their telephone bills higher in the Ninth Circuit's geographic area and lower outside it. Moreover, the inability to challenge unfair/anti-competitive business practice by the carriers places customers in the Ninth Circuit geographic area at a disadvantage vis a vis customers in other areas. Especially in view of the present less optimistic economic outlook, this may provide at least some impetus for such customers to move out of the area, to the detriment of the localities in the Ninth Circuit geographic region.

Moreover, the Ninth Circuit's decision on this issue directly conflicts with that of the Court of Appeal of California, located within the Ninth Circuit's geographic area. See e.g. Day v. AT&T, 63 Cal. App. 4th 325 (1998) ("We hold that the policies which are furthered by the California [Consumer Protection] statutes would be undermined by the filed rate doctrine's presumption of a consumer's ominiscience of filed

rates, and the resulting immunity to common carriers, regardless of any advertising deception used to lure the consumer"). (Emphasis added) Id. at 331. See also Spielholtz v. Superior Court of Los Angeles County, No. B131655 (decided 2/08/01) certified for publication, California Court of Appeal Second Appellate District. [App.6]

Thus, consumers in California are faced with directly conflicting interpretations of the law governing unfair business practices in state and federal courts. A definitive ruling by this Court concerning the issues herein will remove these intolerable conflicts.

II.

By not addressing the constitutional issues raised by plaintiff in his appeal, the 9th Circuit created conflict, confusion and uncertainty as to whether constitutional issues may be raised on appeal. Other circuits and this court have so ruled but the 9th Circuit did not follow those precedents.

This refers to Item No. 10 in Questions for Review, supra. Plaintiff raised important constitutional issues of law in his appeal relying on this Court's opinion in U.S. National Bank v. Independent Insurance Agents of America, 508 U.S. 437, 446, (1993), and Office of Texas Utility Counsel v. Southwestern Bell, et al, 103 F.3d 393 (6th Cir. 1999), both of which cases allowed determination of constitutional issues on appeal as part of the Court's duty and inherent authority. Yet, the 9th Circuit, citing Marbled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996) a case which does not deal directly with constitutional issues, refused to address Plaintiff's constitutional arguments.

This refusal is contrary to precedent and now creates confusion and conflict in that it is uncertain whether related constitutional arguments can be raised on appeal within the 9th Circuit jurisdiction.

Litigants in the Ninth Circuit's jurisdiction are now deprived of an important legal right, a right available to litigants in other circuits and therefore this Court must resolve this conflict.

The Constitutional arguments raised by plaintiff below are as follows.

In his complaint and throughout this case, plaintiff has argued that the USF charge is unlawful. The Ninth Circuit's affirmance of the granting of the motion to dismiss condones and allows to continue the defendants' unlawful collection of a charge which in and of itself is unlawful as unconstitutional in the following respects.

1. THE USF CHARGE AND COLLECTION CONSTITUTE "UNLAWFUL TAKINGS" UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

As stated in a May 8, 1998 FCC report No. CC 98-13 [Exc. 19], the expanded USF is designed to provide subsidies support to eligible schools, libraries and other recipients. 47 USC Section 254 [App.4(6)], 47 CFR 54.703 [App.4(17)], and 47 CFR Section 69.5 [App.4(14)] set forth who must contribute to the USF subsidy fund. 47 CFR Section 69.116 [App.4(15)] states what the contribution charge is and how it is to be computed. The recent U.S. Supreme Court case of Eastern Enterprises v. Apfel, Commissioner of Social Security, ___U.S___, 118 S.Ct. 2131, 141 L.Ed.2d 451(1998) lays down

the criteria for unlawful taking: (1) economic impact of the questioned regulation on the claimant; (2) the extent to which the regulation interferes with claimants' reasonable expectations; and (3) the nature of the governmental action involved.

Under these criteria, the passthrough USF charge is unmistakably an "unlawful taking": it adversely impacts the unaware consumer who does not even know that he is not supposed to pay it and certainly did not expect to pay it when entering into a telephone contract with a long distance carrier; the purpose of the passthrough is to reimburse the carriers for their required contribution; and the passthrough does not further the objective of the USF. Therefore, it is unfair or as Justice Kennedy aptly put it in his concurring opinion in Eastern Enterprises:

> "The remedy created by the Coal Act bears no legitimate relation to the interest which the government asserts in support of the statute." 141 L.Ed.2d at 452(a).

As further incisively stated by the majority:

> "The aim of the [Takings] Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" [Citing authority]. *Id. at 470.*

As it was in Eastern Enterprises, so it is in the case at bar. Here, the FCC demands that a portion of the public, namely those who wish to engage in long-distance telephony, must alone bear the public burdens of paying for benefits to

recipients of the USF, which burdens should be borne by the public as a whole, if at all.

2. THE USF CHARGE AND COLLECTION ARE UNLAWFUL BECAUSE THEY CONSTITUTE A TAX NOT LEGISLATED BY CONGRESS, NOR DO THEY CONSTITUTE A REGULATORY FEE.

The issue here concerns the character and nature of the USF charge. Taxes by definition inure to the general welfare of the populace and are a "public burden laid upon individuals or property to support the government" Black's Law Dictionary, 4th Edition, Taxes, p. 1628 (1957) [Citing cases]; however, the revenues from this charge do not support the government but are intended rather to provide subsidies. Thus, it is necessary to determine if the charge can be classified as a tax or a fee.

Only the Congress has the power to legislate taxes. Constitution, Article I, Section 8, Clause 1. Here, the USF "contributions" and the passthrough are not legislated by Congress.

Thus, the USF cannot be validly classified as a lawful "tax." Consequently, to have any legal status at all the USF must pass muster as a "fee." The recent case of Thomas v. Network Solutions, Inc., 2 F.Supp. 2d 22 (D.C.D.C. 1998) makes clear the distinction between a tax and a fee stating:

> "The Supreme Court distinguishes a tax as a payment which is arbitrarily imposed for some public purpose. In contrast, a fee is payment for a voluntary act, such as obtaining a permit, that goes to defray the expenses of regulating

that act." Id. at 29. [Citing authorities].

Accordingly, the charge imposed by the FCC cannot be a "fee" because: it is involuntary; it does not grant a permit; and it does not go to defray expenses of regulations. Moreover, even if (for sake of argument only) it is deemed a "fee," then it is invalid as discriminatory in that not all telephone carriers are required to contribute. 47 CFR 54.205.

The fact that the charge is measured by telephone revenue gives the USF charge a more "tax-like" character; however, if it is a "tax" it must go to the U.S. Treasury and not to the FCC.

Thus, the USF charge is neither a lawful "tax" nor a legitimate "fee" but is rather a "tax" in effect "passed" by an agency of the executive branch.

Thus, the district judge committed reversible error in allowing the defendants to continue collecting this illegal FCC charge which being neither lawful tax nor legitimate fee is mere tribute extracted by the FCC from the public via its willing accomplices, the defendant long distance telephone carriers. The Ninth Circuit affirmed this error.

3. THE USF SCHEME IS BEYOND THE AUTHORITY OF THE FCC IN THAT AT LEAST A KEY ELEMENT THEREOF, THE INDEPENDENT SUBSIDIARY TO COLLECT AND DISBURSE USF FUNDS, IS BEYOND THE FCC'S AUTHORITY AS DELEGATED BY CONGRESS.

This question was recently considered and determined by the U.S. General Accounting office. In testimony before

the House of Representatives on March 31, 1998 (GAO/T-RCED-OGC-98-84), Robert Murphy, General Counsel for the GAO inserted into the record a statement of testimony entitled: "Telecommunications, FCC Lacked Authority to Create Corporations to Administer Universal Programs" [Exc.20]. Mr. Murphy's statement was very specific that the FCC acted in violation of existing law and must either seek specific statutory authority or restructure the administration of these programs [i.e., the USF] in a manner consistent with law. Id. at p.5.

In this regard, the seminal case of Hampton v. U.S., 276 US 394,48 S.Ct. 348, 72 L.Ed. 624 (1928) is squarely applicable. In Hampton, the well-known judicial maxim "Delegata potestas non potest delegari" was applied to invalidate agency acts and is applicable herein as well. Even assuming arguendo (which plaintiff denies) that the FCC is acting under some delegation from Congress, the FCC cannot lawfully pass through this delegation to the NECA (National Exchange Carrier Association) which initially administered the USF and then direct NECA to create a non-profit subsidiary to administer the USF, bill and collect and disburse the monies [Exc.20].

Thus, at least the part of the USF scheme which involves the setting up of an independent subsidiary corporation to collect USF funds and disburse them is invalid as unconstitutional. Thus, the USF scheme lacking a repository for the constitutional and legal reception of, and disbursement of, funds, the entire scheme fails to pass constitutional muster and must be ruled unlawful and void.

4. THE USF CHARGE IS UNCONSTITUTIONAL AS A BILL OF ATTAINDER EVEN ASSUMING (WHICH

PLAINTIFF DENIES) THAT IT WAS A TAX PASSED BY CONGRESS.

Even if it is assumed arguendo that the USF was properly legislated as a tax (which plaintiff denies) it singles out a specific group of people (i.e. certain long distance carriers and their customers) who must bear the cost of this program alone singling them out for legislatively-prescribed detriment, in violation of the Constitutional prohibition against Bills of Attainder. Constitution, Article I. Section 8, Clause 2.

See United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073, 1078, 90 L.Ed. 1252, 1259 (1946); United States v. Brown 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed. 2d 484 (1965).

In Lovett, a Congressional committee investigated alleged unAmerican activities of federal employees. The Appropriation Act was thereafter amended to provide that no further salary or other compensation should be paid to three named individuals, unless they should thereafter be re-appointed and confirmed by the Senate. In invalidating this provision as unconstitutional, this Court observed that punishment was of a severe type in that its effect was to permanently prevent the singled-out persons from ever holding a government job, whether accomplished by direct prohibition or indirectly by cutting off their pay. The formulation of a Bill of Attainder was restated as follows:

> "Legislative acts, no matter what their form, that apply either to named individuals or easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are Bills of Attainder prohibited by the Constitution." 66S.Ct. 1079, 90 L.Ed. 1259.

As it was in Lovett, so it is here: the easily ascertainable group members are the carriers and their customers, who are punished by being required to pay the USF charge.

On this separate ground alone the USF is illegal and unconstitutional, and uncollectable from the carriers and the public.

5. THE USF IS UNLAWFUL BECAUSE IT IS IMPOSED UPON INTRASTATE CALLS, AS WELL AS INTERSTATE CALLS, IN VIOLATION OF 47 U.S.C. SECTS.151,152.

The Communications Act regulates interstate and foreign communication only and not intrastate ones. 47 U.S.C. Section 151, 152. Collection of funds for the USF on total carrier revenues necessarily includes intrastate as well as interstate revenues and thus violates the letter and the spirit of the Communications Act. This holding was made in Texas Office of Public Utility Counsel, et al v. Federal Communications Commission and the United States of America, 183 F.3d 393 (5th Cir. 1999). See also Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) wherein this Court held that Section 2(b) (47 USC 152(b)) of the Communications Act bars the FCC from regulating intrastate telecommunications services.

At least one long distance carrier in the same position as the defendants herein (who are also parties in the Texas utilities case) concurs concerning intrastate regulation. In the FCC brief in Texas Office of Public Utility Counsel v. FCC at 184, Cincinnati Bell argued that to assess contributions based on both interstate and intrastate revenues is to regulate

intrastate services, and is therefore illegal under Section 2(b) (47 USC 152(b)).

A customer who does not make any interstate calls at all is still charged with the whole USF passthrough: no pro rate charge is made. Thus, for a long distance customer who makes only intrastate calls or makes no long distance calls at all, the entire USF charge is still billed and collected. Obviously, this violates the statutory prohibition against regulation of intrastate communications by the FCC. 47 USC Sec. 152(b).

6. THE USF CHARGE VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST TAXES OR DUTIES ON EXPORTS.

No tax or duty shall be laid on articles exported from any State. Constitution, Article I, Section 9, Clause 5.

Revenues from telephone calls overseas are shared with foreign carriers and thus a tax on the total revenue of a long distance carrier will include those revenues received from abroad for international calls. The imposition of the USF charge thus in effect taxes exports, i.e., telephone calls, and their physical manifestation in terms of electric currents or radio frequency waves.

In a recent case, United States v. United States Shoe Corporation, ___U.S.___, 118 S.Ct. 1290, 140 L.Ed 2d 453 (1998), the United States Supreme Court declared a charge known as the Harbor Maintenance Fee (HMF) to be a tax or duty on exports violative of the Constitutional prohibition since the HMF bore no relation to any services rendered and was calculated on the tonnage of ships loaded for export. Similarly, the USF and its passthrough charge as discussed supra in detail

bear no relation to any international, or domestic, telephone service and is being assessed on the carriers by the number of telephone lines which they employ.

Consequently, the USF charge is illegal at its very core and accordingly is unlawful to collect.

7. THE USF IS UNLAWFUL BECAUSE IT ATTEMPTS TO DISPOSE OF FEDERAL PROPERTY WITHOUT CONGRESSIONAL CONTROL.

Article IV Section 3 of the Constitution provides for the disposal of federal property by Congress. Here, USF revenues which accrue to an arm (the independent Corporation set up by the FCC) of the executive branch, and thus belong to the Federal government, are being disbursed in the form of grants to various entities without any control by Congress over such disposal of U.S. property.

Hence, the entire scheme of collecting these funds and their disbursements is illegal under Article IV, Section 3 of the Constitution.

8. THE USF, PARTICULARLY THE PASSTHROUGH TO THE PUBLIC, IS UNLAWFUL AS A VIOLATION OF DUE PROCESS UNDER THE UNITED STATES CONSTITUTION, FIFTH AMENDMENT.

A customer who does not pay the passthrough USF charge will see his telephone service cut off. Service will be cut off not because the customer did not pay for his telephone usage but because he did not pay a charge that is unrelated to whether he made any calls at all. Such is a violation of due

process of law in that the consumer is being deprived of his property rights without a hearing, input or any influence at all in the decision to impose the charge upon him and this charge bears no relationship to any "legitimate interest" (per Justice Kennedy in Eastern Enterprises) in regard to telephone service.

III.

By affirming the district court's refusal to enter the default of the defendants, the 9th Circuit created ambiguity, conflict and uncertainty as to the meaning of Rule 81(C) FRCP and the meaning and applicability of Rule 6 F.R.Civ.P.

This includes Items Nos. 11,12 in Questions for Review, supra. The 9th Circuit affirmed the District Court's refusal to enter the default of the defendants who removed the case from the Superior Court of Los Angeles County to the Federal Court on August 12, 1998. Pursuant to a plain reading of Rule 81(c), F.R.Civ.P the Defendants were clearly in violation of that Rule on August 17, 1998 when the time frames called for in that Rule (the longer of five days from removal or twenty days from service of process) took effect and there was still no responsive pleading filed by the removing parties. On August 20, 1998, well after the due date, defendants filed a Rule 12(b)(6) motion to dismiss.

Plaintiff requested the Clerk to enter the default of defendants before their Motion was filed. The Clerk rejected the request on technical grounds (allegedly a proof of service was missing) and referred the matter to the Judge. Judge Collins stated to Plaintiff's counsel as follows: "it was unreasonable and meritless for you to believe that I was going to enter a default against AT&T, even if they had been guilty, so to speak, of filing something a day or two long [sic]"

[Exc.16] and not only that, but sanctioned Plaintiff's counsel for even making the request.

Judge Collins used Rule 6(a), F.R.Civ.P., in support of her tortured mischaracterization of the requirements of Rule 81(c).

By affirming her decision, the 9th Circuit in effect created a new rule favoring large corporate defendants who remove cases from State Court.

In the light of the 9th Circuit's decision, uncertainty and conflict now prevail within that appellate jurisdiction. Since the change of the law in 1988 making removal easier, removal by corporate defendants has become a standard modus operandi. If now, these removing parties are given extra time by allowing Rule 6 to apply together with Rule 81(c), plaintiffs in removed cases in the 9th Circuit jurisdiction are placed at a disadvantage and uncertainty as to their legal rights. Prior to the 9th Circuit's untenable interpretation of the time limits in remanded cases, there was no indication that Rule 6(a) could apply in a removal situation because Rule 6(a) by its terms is limited to situations where the response period is 11 days or less whereas Rule 81(c) provides a response period of at least 20 days.

Consequently, this conflict between the plain words of Rules 6(a), and 81(c) and the Ninth Circuit's interpretation of them must be resolved by this Court.

IV.

By affirming the district court's taking of Judicial Notice of the alleged rate filings by the defendants with the FCC, the 9th Circuit created a new rule in conflict with established criteria for judicial notice and this court must address the issue since it pertains to other situations involving agencies with which documents are to be filed and the subsequent taking of Judicial Notice of such documents.

This includes Item No. 13 in Questions for Review, supra. Defendants AT&T and MCI claimed that they filed rates with the FCC and asked the District Court to take Judicial Notice of such filings. Defendant Pac Bell did not claim to file rates with the FCC but rather with the California Public Utility Commission. It should be noted that defendant Pac Bell's alleged filings dated to 1985 well before the USF charge was created.

In light of the detariffing policy at the FCC, it turned out that though defendants claimed they have filed tariff's such may not have been the true facts. Plaintiff throughout objected to the Court's taking of judicial notice of these filings since the samples provided were so technical, voluminous and virtually illegible in nature that no one could understand their meaning let alone take any notice of their effect. It should also be noted that the defendants very carefully refrained from providing any evidentiary support such as declarations under penalty of perjury that there were actual filings and as to authenticity and genuineness of the copies presented to the court. Yet, the District Court took judicial notice of these alleged filings and the 9th Circuit affirmed even though it was quite apparent that there were serious, perhaps fatal, questions about these filings.

The implications of this decision are enormous. Many governmental bodies requiring document filings have lately embarked upon a policy of reduction of paperwork and the FCC's detariffing practices are an example of such policies. As it stands now the 9th Circuit allows for the taking of judicial notice of allegedly filed documents even when no such documents were actually filed or if filed, are so couched that special expertise is required to understand them.

This Court must now resolve this issue because litigants in the 9th Circuit may suffer a disadvantage vis a vis litigants in other Circuits from this novel interpretation of what judicial notice may encompass.

V.

The 9th Circuit's decision aids and abets miscarriage of justice in that defendants who were aware of the FCC's detariffing policies did not inform the court and thus escaped the constraints of the collateral estoppel rule. This court must reiterate the rule that officers of the court must at all times fully disclose any relevant information they possess which may affect the outcome of the case. If that is not done the Collateral Estoppel Rule in the 9th Circuit will have become devoid of all meaning thereby depriving litigants in the jurisdiction of important legal rights.

This section includes Item No. 8 of Questions for Review, supra. Unfortunately litigation has become a game in which winning at al costs has come to be interpreted as keeping everyone in the dark about what you are doing outside the courtroom. Yet, attorneys are under a duty to inform the Court

of any information, even if it is adverse to their case, which has any bearing on the matter at hand.

In the case herein, defendant telephone carriers were involved in many cases which have decided similar issues to those presented in the case at bar, yet they failed to disclose the true facts to the Court. In fact the very same counsel for MCI who urged the DC Circuit to overturn the detariffing policy of the FCC because in the absence of filed rates it may be possible for claimants to use contract and common law remedies in claims against telephone carriers, that very same counsel appeared in the case herein and did not bother to disclose the fact that the D.C. Circuit had ruled adversely on the issue.

Even though Plaintiff pointed out the Ninth Circuit the D.C. Circuit's opinion and urged that by virtue of collateral estoppel the defendants must be bound by that decision, the Ninth Circuit ignored and chose not to address the issue. Similarly, the Ninth Circuit ignored and did not address the Blackman decision (op.cit) which likewise bound the defendants. In fact, the Ninth Circuit's response to plaintiff's Rule 28(j) notice to this effect was to cancel oral argument. As a result, the doctrine of collateral estoppel is now devoid of any effect and meaning and the 9th Circuit has aided and abetted a miscarriage of justice in allowing officers of the Court not to disclose relevant information about the case at the bar. Such nondisclosure compounds litigation unnecessarily, places small litigants at a great disadvantage in relation to large corporate adversaries and empties of all content such traditional and accepted rules of behavior for counselors and attorneys as have been in effect for years in many jurisdictions.

The Court therefore must reiterate the time-honored rule that requires attorneys to disclose all they know about the case before the court and other information which may affect

the decision. This will promote judicial economy and efficiency.

VI.

The 9th Circuit's stated ground for affirming the Denial of Remand of this cause to the Superior Court where it was originally brought by plaintiff creates a criterion for removal jurisdiction directly contrary to well-settled law enunciated by this Court and followed by the Circuits including prior holdings of the 9th Circuit

This section includes Items Nos. 6,8, in Questions for Review, supra. The ground given for affirming denial of remand was that the complaint stated that the complained-of conduct of defendants was in violation of State and Federal Law [App.1,p.3]. This ground is directly contrary to over 100 years of authorities from this Court and other courts including the Ninth Circuit in prior cases. The established law Is that neither party can remove a case to federal court when defendant interposes a defense under federal law to a non-federal claim by plaintiff. Tennessee v. Union & Planters' Bank, 152 U.S. 454, 14 S.Ct. 654, 38 L.Ed.511 (1894).

That a case may turn upon a construction of a federal statute, does not cause the case to fall within removal jurisdiction if it is not founded on federal law. Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S.1, 103 S.Ct. 2480, 77 L.Ed. 2d 420 (1983).

Accordingly, the only actions which can be properly removed to the federal court are those which could have been brought there in the first place. Ethridge v. Harbor House

Restaurant, 861 F.2d 1389 (9th Cir. 1988).

The parties did not dispute that the district court was not the proper forum: the plaintiff contending that the California Superior Court was proper, the defendants contending that the FCC was the proper forum.

In a case where the defendants removed to federal court contending that the cause was cognizable only before the National Labor Relations Board, and where the district court had dismissed the case, the Ninth Circuit on appeal reversed and remanded holding that, "District Courts may not take removal jurisdiction over a case within the NLRB's exclusive jurisdiction for the limited purpose of dismissing to protect the jurisdiction of the NLRB." Ethridge v. Harbor House, supra, at 1405.

Such dismissal to protect the alleged jurisdiction of the FCC was precisely what happened here. Thus, the Ninth Circuit ignored its own precedent.

Moreover, the Ninth Circuit ignored the collateral estoppel effect of a remand to Superior Court by the Central District of California in a similar case against the same defendants, Blackman and Mediano v. At&T Corporation, MCI Telecommunications Corporations, Civil No. 99-0142 RT(VAPx) [App.5].

By the doctine of collateral estoppel as set forth in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1970), the Blackman case ruling should have been held binding on the defendants; however, the Blackman case and decision/opinion were ignored by the Ninth Circuit.

As a result of the above-described failure to follow the authority of this Court and its own precedents the Ninth Circuit has placed the law of remand in the Circuit into a state of confusion, uncertainty and conflict with other circuits which follow the law as enunicated by this Court. In view of the burgeoning use of the removal weapon after the 1988 law revision enabling easy removal, plaintiffs--particularly individuals matched against corporate defendants--are put at an unfair disadvantage by the inconsistent and unpredictable decisions of the Ninth Circuit as well as vis a vis plaintiffs in circuits other than the Ninth.

Only this Court can resolve and correct this situation.

VII.

By affirming the District Court's denial of leave to amend the original unamended complaint, the 9th Circuit rendered hollow the policy of Rule 15, F.R.Civ.P. of liberal granting of leave to amend with THE result that litigants are now at a disadvantage in that court's jurisdiction SINCE they do not have the same rights as litigants in other jurisdictions and this court must reiterate the right to amend in the interests of fairness, justice and uniformity.

This includes Item 9 in Questions for Review, supra. The District Court judge stated that Plaintiff may have some valid causes of action but nonetheless denied the request to amend. The Ninth Circuit affirmed that decision even though it flies in the face of the language of Rule 15 F.R.Civ.P which states that "leave [to amend] shall be freely given when justice so requires". Plaintiff cited authorities to the Ninth Circuit in support of the liberal amendment policy of the federal courts

but the 9th Circuit did not address this matter. As a result of the decision herein, litigants in the Ninth Circuit are now at a distinct disadvantage in that the courts in the Ninth Circuit may arbitrarily and without justification decide to deny the right to amend even if it appears that a case may have merit. Such is a perversion of justice in that litigants such as plaintiff here, do not have their "day in court", have their cases thrown out on technicalities and are not given any chance to cure alleged defects in the pleadings. This Court must therefore reiterate the long established and time-honored rule of doing justice by calling for and enforcing a liberal amendment policy in the interests of fairness, justice and uniformity.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted. As an alternative to granting this Petition, Petitioner respectfully requests summary reversal of the Ninth Circuit's decision in this case and/or remand to the Ninth Circuit with instructions for proceedings not inconsistent herewith.

Respectfully submitted,

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Joseph R. Evanns

April 3, 2001.

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed October 25, 2000]

No. 99-55165
CT/AG#: CV-98-06645-ABC

JOSEPH R. EVANNS, as an individual and on behalf of all those similarly situated,
Plaintiff-Appellant,

v.

AT&T CORPORATION, a corporation; MCI CORPORATION, a corporation; PACIFIC BELL, INC., a corporation; MCI TELECOMMUNICATIONS CORPORATION, erroneously sued as MCI Corporation; MCI COMMUNICATIONS CORPORATION, erroneously sued as MCI Corporation,
Defendants-Appellees.

APPEAL FROM the United states District Court of the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California. Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered: 10/25/00

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed October 25, 2000]

No. 99-55165
DC No. CV-98-06645-ABC

JOSEPH R. EVANNS, as an individual and on behalf of all those similarly situated,
Plaintiff-Appellant,

v.

AT&T CORPORATION, a corporation; MCI CORPORATION, a corporation; PACIFIC BELL, INC., a corporation; MCI TELECOMMUNICATIONS CORPORATION, erroneously sued as MCI Corporation; MCI COMMUNICATIONS CORPORATION, erroneously sued as MCI Corporation,
Defendants-Appellees.

MEMORANDUM[1]

Appeal from the United States District Court

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

for the Central District of California
Audrey B. Collins, District Judge, Presiding

Submitted September 14, 2000[2]
Pasadena, California

Before: T.G. NELSON, TASHIMA AND SILVERMAN, Circuit Judges.

We have jurisdiction under 28 U.S.C. § 1291. We affirm.

A. Judicial Notice of Tariffs

The tariffs are a matter of general public record. The district court did not abuse its discretion when it took judicial notice of the tariffs in ruling on the motion to dismiss.[3]

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[2]The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

[3]*See Peabody v. Maud Van Cortland Hill Schroll Trust,* 892 F.2d 772, 777-78 (9th Cir. 1989) (reviewing decision to take judicial notice for abuse of discretion); *Mir v. Little Co. of Mary Hosp.,* 844 F.2d 646, 649 (9th Cir. 1988) ("In addition to the complaint, it is proper for the district court to 'take judicial notice of matters of public record outside the pleadings' and consider them for purposes of the motion to dismiss.").

B. Motion for Entry of Default

The complaint was filed in state court on July 10, 1998, and removed to federal court on August 13, 1998. The defendants were thus required to file their responsive pleadings by August 20, 1998.[4] They complied with this deadline. Denial of the motion for entry of default was therefore proper.

C. Removal Jurisdiction

"The presence or absence of federal question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint."[5] Evanns' complaint alleges that the conduct of the carrier defendants was "wrongful, illegal and unlawful under State *and* Federal law."[6] The face of the complaint thus presents the federal question of whether the defendants' conduct violated *federal* law. The district court therefore had original subject matter jurisdiction under 28

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[4]*See* Fed. R. Civ. P. 81(c) (setting out time period for filing responsive pleading in a removed case); Fed. R. Civ. P. 6(a) (setting out method by which time periods under the rules are to be computed).

[5]*Audette v. International Longshoremen's & Warehousemen's Union*, 195 F.3d 1107, 1111 (9th Cir. 1999).

[6]Complaint at 2 (emphasis added).

U.S.C. § 1331,[7] and removal was proper under 28 U.S.C. § 1441(a).[8]

D. Rule 11 Sanctions

Evanns' motion for entry of default and argument in support of that motion--that the time for defendants' filing of a responsive pleading ran on August 19, 1998, rather than on August 20, 1998[9] n9--were "both baseless and made without a reasonable and competent inquiry."[10] The district court's imposition of Rule 11 sanctions was therefore proper and not an abuse of the district court's discretion.[11]

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[7]"The district courts shall have original jurisdiction of all civil actions arising under the . . . laws . . . of the United States." 28 U.S.C. § 1331.

[8]"Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States." 28 U.S.C. § 1441(a).

[9]On appeal, Evanns argues that the time for filing a responsive pleading ran on August 17, 1998.

[10]*Buster v. Greisen,* 104 F.3d 1186, 1190 (9th Cir. 1997).

[11]*See id.*

AFFIRMED.[12]

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[12]The question of the application of the "filed rate doctrine" is addressed in a published opinion filed contemporaneously with this memorandum. We decline to address the other issues Evanns raises on appeal because he failed to raise them before the district court. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1063 (9th Cir. 1996).

APPENDIX 2

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed October 25, 2000]

No. 99-55165
DC No. CV-98-06645-ABC

JOSEPH R. EVANNS, as an individual and on behalf of all those similarly situated,
Plaintiff-Appellant,

v.

AT&T CORPORATION, a corporation; MCI CORPORATION, a corporation; PACIFIC BELL, INC., a corporation; MCI TELECOMMUNICATIONS CORPORATION, erroneously sued as MCI Corporation; MCI COMMUNICATIONS CORPORATION, erroneously sued as MCI Corporation,
Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Submitted September 14, 2000[1]
Pasadena, California

Filed October 25, 2000

Before: Thomas G. Nelson, A. Wallace Tashima and
Barry G. Silverman, Circuit Judges

Opinion by Judge T.G. Nelson

T.G. NELSON, Circuit Judge:

The principal issue to be addressed in this appeal is whether the filed-rate doctrine bars a suit by a consumer challenging a carrier's pass-through of a fee imposed by the Federal Communications Commission.

I.

The Federal Communications Commission ("FCC" or "Commission") requires communication carriers to remit funds to the FCC's Universal Service Fund ("USF") pursuant to the

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[1]The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Commission's "Universal Service Order."[2] Pursuant to authority granted them by the FCC, AT&T and MCI passed the USF fee on to their customers. Pacific Bell did not, but did collect the fee for AT&T and MCI for services they had rendered to Pacific Bell customers.

Joseph R. Evanns sued AT&T, MCI and Pacific Bell in California Superior Court, alleging that the USF fee, or "e-rate" as he described it, was "wrongful, illegal and unlawful under State and Federal Law." He sought damages in excess of one billion dollars and attorneys' fees of seventy million dollars. The carriers removed the case to federal district court and moved to dismiss for failure to state a claim on which relief could be granted. The district court found that it had jurisdiction and dismissed the complaint pursuant to the filed-rate doctrine.

On appeal, Evanns raises a number of issues, some of which were not raised in the district court. In this opinion, we address only the district court's dismissal pursuant to the filed-rate doctrine.[3]

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[2]*See* Report and Order, *In re Federal State Joint Board on Universal Service,* 12 FCC Rcd 8776 (1997) ("Universal Service Order").

[3]The other issues raised by Evanns are addressed in an unpublished memorandum filed contemporaneously with this opinion.

II.

We review *de novo* the district court's dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).[4] Evanns' complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond a doubt that [he] can prove no set of facts in support of his claim which would entitle him to relief."[5]

Evanns' complaint alleges that the defendants have "collected from users of long distance telephones a special assessment surcharge"; that this "assessment was collected in order to fund a program set up by the Federal Communications Commission ('FCC') known as 'e-rate'"; that, by collecting this assessment, the defendants "wrongfully and illegally and unlawfully . . . have passed on these costs to their customers in the form of the special assessment"; and that the special "assessment [is] wrongful, illegal and unlawful under State and Federal Law."[6] Assuming, as we must, that the *facts* alleged in the complaint are true,[7] the filed-rate doctrine prevents Evanns from stating a claim, under either federal *or* state law, upon which relief can be granted. The district court's dismissal was therefore proper.

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[4]*See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998).

[5]*Id.*

[6]Complaint at 2-4.

[7]*See Steckman*, 143 F.3d at 1295 (In determining whether dismissal of a complaint is proper under Rule 12(b)(6), "we must treat all of plaintiff's factual allegations as true.")

The filed-rate doctrine, also known as the "filed-tariff doctrine," derives from the tariff-filing requirements of the Federal Communications Act ("FCA").[8] Under this doctrine, once a carrier's tariff is approved by the FCC, the terms of the federal tariff are considered to be "the law" and to therefore "conclusively and exclusively enumerate the rights and liabilities" as between the carrier and the customer.[9] Not only is a carrier forbidden from charging rates other than as set out in its filed tariff,[10] but customers are also charged with notice of the terms and rates set out in that filed tariff and may not

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[8]Under the FCA, every common carrier must file with the FCC "schedules" (also known as "tariffs") "showing all charges" and "showing the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a). Furthermore, a carrier may not lawfully "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." 47 U.S.C. § 203(c)(3).

[9]*Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998); *see Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487 (7th Cir. 1998) ("[T]he filed tariff is the contract between the plaintiff . . . and Sprint."); *American Tel. & Tel. Co. v. City of New York*, 83 F.3d 549, 552 (2d Cir. 1996) ("[F]ederal tariffs have the force of law and are not simply contractual."); *MCI Telecomm. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992) ("[F]ederal tariffs are the law, not mere contracts."); *Carter v. American Tel. & Tel. Co.*, 365 F.2d 486, 496 (5th Cir. 1966) ("[A] tariff, required by law to be filed, is not a mere contract. It is the law.").

[10]*Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981).

bring an action against a carrier that would invalidate, alter or add to the terms of the filed tariff.[11]

Moreover, "the filed rate doctrine bars all claims - state and federal - that attempt to challenge [the terms of a tariff] that a federal agency has reviewed and filed."[12] For example, in *American Tel. & Tel. Co. v. Central Office Tel., Inc.*,[13] the Supreme Court held that the filed-rate doctrine barred the plaintiff's state-law claims for breach of contract (including breach of an implied covenant of good faith and fair dealing) and tortuous interference with contractual relations.[14] In so holding, the Court rejected the argument that the saving clause of the FCA, 47 U.S.C. § 414, preserved these state law claims:

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[11]*See American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222, 227 (1998) (noting that the filed-rate doctrine applicable to the Interstate Commerce Act also applies to the FCA, that under the doctrine "[d]eviation from [the filed rate] is not permitted . . . [and customers] are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable," and that "the rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier"); *Kansas City S. Ry. Co. v. Carl*, 227 U.S. 639, 653 (1913) (discussing the filed-rate doctrine in the context of tariffs filed in compliance with the Interstate Commerce Act).

[12]*County of Stanislaus v. Pacific Gas & Elec. Co.*, 114 F.3d 858, 866 (9th Cir. 1997); *see Marcus*, 138 F.3d at 56-57, 64-65 (finding breach of warranty, negligent misrepresentation, false advertising and unjust enrichment claims to be barred by filed tariffs).

[13]524 U.S. 214.

[14]*Id.* at 227-28.

"[Section 414] preserves only those rights that are not inconsistent with the statutory filed-tariff requirements. A claim for services that . . . directly conflicts with the tariff - the basis for both the tort and contract claims here - cannot be 'saved' under § 414."[15]

In an attempt to circumvent the well-established filed-rate doctrine, Evanns argues that he is not challenging the defendant carriers' filed tariffs. As Evanns puts it, his claim is that the defendants' collection of the USF assessment is unlawful because "by law (47 CFR 69.604) they are not allowed to collect it unless they *disclose* to their customers that the customers are paying the defendants' own USF assessments and that this is not a charge required by the government to be paid by the consumers."[16] In other words, Evanns claims that the defendant carriers had a duty to disclose that they were making an affirmative business decision to pass through the USF charge to the consumer rather than pay it themselves.

The USF assessments are, however, included in the defendant carriers' tariffs filed with the FCC. The defendants were therefore *required to collect*, and the consumers *required to pay*, this assessment.[17] The filed-rate doctrine bars Evanns'

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[15] *Id.* at 227 (citation omitted).

[16] Appellant's Op. Br. at 17-18 (emphasis added); *see* Appellant's Reply Br. at 7.

[17] *See Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97-98 (1915) (Even "[i]gnorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate

claim, whether based on federal *or* state law, that the collection of the assessment in compliance with the tariffs was unlawful.[18] Moreover, because, as stated previously, the terms of the filed tariffs "conclusively and exclusively enumerate the rights and liabilities of the contracting parties,"[19] Evanns' claim that the defendant carriers had obligations to him *beyond those* set out in the filed tariffs, i.e., that the defendants had a duty to *disclose* the fact that the USF assessment was a pass-through charge, is also barred by the filed-rate doctrine.[20]

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filed. . . . The [applicable published] rate is that which the carrier must exact and that which the shipper must pay." (citations and quotations omitted)).

[18]*See Central Office,* 524 U.S. at 226-27; *Marcus,* 138 F.3d at 60-62.

[19]*Marcus,* 138 F.3d at 56.

[20]*See id.* at 61-62 (finding non-disclosure claims to be barred by filed-rate doctrine); *see also Central Office,* 524 U.S. at 227 ("The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.").

III.

The filed-rate doctrine bars any claim, whether couched in terms of federal *or* state law, attacking the defendants' collection of the USF assessment in compliance with the terms of the filed tariffs.[21] The district court's dismissal of Evanns' complaint is therefore affirmed.[22]

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[21]Evanns does not claim that the defendant carriers have failed to comply with the terms of their filed tariffs, nor does he claim that the terms of the filed tariffs themselves are unreasonable or unjust. Evanns claims only that the carriers had obligations beyond those set out in their filed-tariffs - to disclose that the assessment set out in the tariffs was a pass through. For the reasons previously set forth, such a claim cannot survive the filed-rate doctrine.

[22]*Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956), and *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), two cases relied on extensively by Evanns, are inapplicable to the present case. The question before the Court in those cases was whether the Federal Power Act and the Natural Gas Act gave a public utility company and a natural gas company the authority to unilaterally change a private rate agreement for distribution of electricity/gas simply by filing a new rate schedule with the Federal Power Commission. The Court held that the Acts did not confer such authority. *See Sierra*, 350 U.S. at 352-53; *Mobile*, 350 U.S. at 343-44. The holdings in *Sierra* and *Mobile* are not applicable to the present case because in the present case we are addressing the FCA, not the Federal Power Act and the Natural Gas Act and, as the Court recognized in *Mobile*, in contrast to the Federal Power Act and Natural Gas Act, the Commerce Act (and hence the FCA) "precludes private rate agreements by its requirement that the rates to all shippers be uniform." 350 U.S. at 338.

AFFIRMED.

APPENDIX 3

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed January 3, 2001]

No. 99-55165
DC No. CV-98-06645-ABC

JOSEPH R. EVANNS, as an individual and on behalf of all those similarly situated,
Plaintiff-Appellant,

v.

AT&T CORPORATION, a corporation; MCI CORPORATION, a corporation; PACIFIC BELL, INC., a corporation; MCI TELECOMMUNICATIONS CORPORATION, erroneously sued as MCI Corporation; MCI COMMUNICATIONS CORPORATION, erroneously sued as MCI Corporation,
Defendants-Appellees.

ORDER

Before: T.G. NELSON, TASHIMA AND SILVERMAN, Circuit Judges.

The Panel has voted to deny appellant's petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

APPENDIX 4

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const., Art. I, Sec. 8

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

U.S. Const., Art. I, Sec. 9

* * * * *

No Bill of Attainder or ex post facto Law shall be passed.

* * * * *

No Tax or Duty shall be laid on Articles exported from any State.

U.S. Const., Art. IV, Sec. 3

* * * * *

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or

other Property belonging to the United States; and nothing in this Constitution shall be so . . .

28 USC Sec. 1447(c)

* * * * *

A motion to remand the case of the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before the final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

47 USC Sec. 254(d)
Telecommunication carrier contribution.

Every telecommunication carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The commission may exempt a carrier or class of carriers from this requirement of the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de

minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

F.R.Civ.P. 47 Sec. 208
Complaints to Commission; investigations

Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such a manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

F.R.Civ.P. 47 Sec. 151
Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people o the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of the chapter.

F.R.Civ.P. 47 Sec. 1512(a), (b)
Application of Chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or

radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201-205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2)-(4) of this subsection.

Business and Professions Code Sec. 17203
Injunctive Relief -- Court Orders

Any person performing or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction. The court may make such orders or judgment, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person or any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money, or property, real or personal, which may have been acquired by means of such unfair competition.

Business and Professions Code Sec. 17533.6

It is unlawful for any person, firm corporation or association that is a non-governmental entity to solicit . . . . payment for a product or service by means of mailing that contains . . . . any other tern or that reasonably could be interpreted or construed as implying any . . . . government connection, approval or endorsement.

Business and Professions Code Sec. 17535

. . . may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or

which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.

47 CFR Sec. 69.5(d)

Universal Service Fund and Lifeline Assistance charges shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services and that have at least .05 percent of the total common lines presubscribed to interexchange carriers in all study areas.

47 CFR Sec. 69.116(a)

(a) A charge that is expressed in dollars and cents per line per month shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services and that have at least .05 percent of the total common lines presubscribed to interexchange carriers in all study areas.

(b) The charge shall be computed by the association on a semi-annual basis by dividing one-twelfth of the projected annual Universal Service Fund revenue requirement by the total number of common lines presubscribed to interexchange carriers defined in §69.116(a). Beginning on April 1, 1989, the association shall bill and collect the charge, and disburse associated revenue, on a monthly basis pursuant to §69.603(c).

(c) Telephone companies shall provide the association the data necessary to compute the charge. These data shall include the number of presubscribed common lines in each study area and the number of those lines associated with each interexchange carrier serving that study area. In a study area served by a single interexchange carrier, all common lines shall be considered as presubscribed to that interexchange carrier. Information concerning presubscribed common lines shall be filed with the association on June 30 and December 30 of each year, except for the first such submission, containing presubscribed common line data calculated as of December 31, 1987, which shall be filed on August 1, 1988. presubscribed common line data filed on June 30 shall be calculated as of December 31 of the preceding year, and presubscribed common line data filed on December 30 shall be calculated as of June 30 of the same year.

47 CFR Sec. 69.616(a)
Independent subsidiary functions

The independent subsidiary shall be solely responsible for administering the universal service support mechanisms for high-costs areas and low-income consumers, including billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds. The independent subsidiary also shall be required to perform any other duties of the Administrator that relate to the billing collection, and disbursement of funds that are specified elsewhere in the Commission's universal service rules.

47 CFR Sec. 69.604(a)

Telephone companies shall bill and collect all access charges except those charges specified in §§69.116 and 69.117.

Federal Register Vol. 62 No. 116, P. 32961 (6/17/97), Sec. 54.703(a) -- Contributions

Entities that provide interstate telecommunications to the public, or to such classes of users as to be effectively available to the public, for a fee will be considered telecommunications carriers providing interstate telecommunications services and must contribute to the universal service support programs. Interstate telecommunications include, but are not limited to:

(1) Cellular telephone and paging services;
(2) Mobile radio services;
(3) Operator services;
(4) Personal communications services *(PCS)*;
(5) Access to interexchange service;
(6) Special access service;
(7) WATS;
(8) Toll-free service;
(9) 900 service;
(10) Message telephone service (MTS);
(11) Private line service;
(12) Telex;
(13) Telegraph;
(14) Video services;
(15) Satellite service;
(16) Resale of interstate services; and

(17) Payphone services-

(b) Every telecommunications carrier that provides interstate telecommunications services, every provider of interstate telecommunications that offers telecommunications for a fee on a non-common carrier basis, and payphone providers that are aggregators shall contribute to the programs for eligible schools, libraries, and health care providers on the basis of its interstate, intrastate, and international end-user telecommunications revenues. Entities providing open video systems (OVS), cable leased access, or direct broadcast satellite (DBS) services are not required to contribute on the basis of revenues derived from those services.

(c) Every telecommunications carrier that provides interstate telecommunications services, every provider of interstate telecommunications that offers telecommunications for a fee on a non-common carrier basis, and payphone providers that are aggregators shall contribute to the programs for high cost rural and insular areas, and low-income consumers on the basis of its interstate and international end-user telecommunications revenues. Entities providing OVS, cable leased access, or DBS services are not required to contribute on the basis of revenues derived from those services.

Federal Register Vol. 62 No. 116, P. 32961 (6/17/97), Sec. 54.705 -- De minimus exemption

If a contributor's contribution to universal service in any given year is less than $100, that contributor will not be required to submit a contribution or Universal Service worksheet for that year. If a contributor improperly claims exemption from the contribution requirement, it will subject to the criminal provisions of sections 220 (d) and (e) of the Act regarding willful false submissions and will be required to pay the amounts withheld plus interest.

Federal Register Vol. 62 No. 116, P. 32931 (6/17/97), Sec. 491, 492

491. Furthermore, we agree with the Joint Board and reject commenters' suggestions that the Commission mandate that carriers recover contributions through an end-user surcharge. The state Joint Board members also assert that state commissions "should have the discretion to determine if the imposition of an end-user surcharge would render local rates unaffordable." A federally prescribed end-user surcharge would dictate how carriers recover their contribution obligations and would violate Congress's mandate and the wish of the state members of the Joint Board.

492. To the extent that carriers seek to pass all or part of their contributions on to their customers in customer bills, we wish to ensure that carriers include complete and truthful information regarding the contribution amount. We do not assume that contributors will provide false or misleading statements, but we are concerned that consumers receive

complete information regarding the nature of the universal service contribution. Unlike the SLC, the universal service contribution is not a federally mandated direct end-user surcharge. We believe that it would be misleading for a carrier to characterize its contribution as a surcharge. Specifically, we believe that characterizing the mechanism as a surcharge would be misleading because carriers retain the flexibility to structure their recovery of the costs of universal service in many ways, including creating new pricing plans subject to monthly fees. As competition intensifies in the markets for local and interexchange services in the wake of the 1996 Act, it will likely lessen the ability of carriers and other providers of telecommunications to pass through to customers some or all of the former's contribution to the universal service mechanisms. If contributors, however, choose to pass through part of their contributions and to specify that fact on customers' bills, contributors must be careful to convey information in a manner that does not mislead by omitting important information that indicates that the contributor has chosen to pass through the contribution or part of the contribution to its customers and that accurately describes the nature of the charge.

APPENDIX 5

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August 4, 2000

Mr. Christopher Anderson, Clerk
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, California 94119-3939

RE: EVANNS v. AT&T
CASE: 99-55165

Dear Mr. Anderson:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, submitted herewith are two recent decisions that are significant and pertinent and believed to be dispositive in favor of plaintiff/appellant in the within Appeal. Four (4) copies of these decisions are attached hereto for the Court's convenience. The cases are:

(1) Myron Blackman and Patti Mediano v. AT&T Corporation, MCI Telecommunications Corporation, No. EDCV 99-0142 RT (VAPx) (C.D. Cal., Eastern Division, decided 3/3/2000); and

(2) MCI WorldCom, Inc. et al v. Federal Communications Commission and United States of America, ____ F.3d ____, Civil No. 96-1459 (D.C Cir. decided 4/28/2000). The foregoing cases are submitted by plaintiff/appellant with the belief that they are pertinent to the issues of remand to Superior Court and the defendants' filed-rate defense.

The first of these decisions, by Judge Robert J. Timlin, of the Central District of California, Eastern Division, wherein the Central District of California remanded tile case to the Superior Court, is directly on point on tile issue of the improper removal of the Evanns case from Superior Court to Federal Court. This issue was raised in the Evanns Appeal Brief at pages 11-16.

The second decision attached hereto, decided April 28, 2000 by the U.S. DC CIRCUIT COURT OF APPEALS in the case of MCI WORLD COMMUNICATIONS et al v FCC et al, affirms the Federal Communications Commission's mandatory detariffing policy and refusal to accept tariff filings by MCI (one of the defendants herein) and other long-distance carriers, as well as tile non-viability of the filed-rate doctrine relied upon by tile defendants herein.

Appellant Evanns raised the issue of the non-applicability of the filed-rate doctrine to the instant case (Opening Brief, pp. 32-38) and further raised the issue of improper judicial notice in his Brief (pp. 51-53) with regard to such allegedly- filed or (non-filed) tariffs.

The within cases appear binding on defendants not only on general principles of stare decisis, but also on issue-preclusion

collateral estoppel (see e.g. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation 402 U.S. 313 (1970)) the defendants herein having had tile same issues as present herein decided against them in tile cited cases.

Respectfully submitted,

Egon Mittelmann

Cc: All counsel per attached mailing list
cc: Joseph R. Evanns, Esq.

Blackman, et al. v. AT&T Corp., et al.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

[Filed March 3, 2000]

No. EDCV 99-0142 RT (VAPx)

MYRON BLACKMAN and PAUL MEDIANO, *Plaintiffs*,	)
v.	)
AT&T CORPORATION, MCI TELECOMMUNICATIONS CORPORATION, and DOES 1 through 20, INCLUSIVE, *Defendants*.	)

ORDER (1) GRANTING PLAINTIFFS' MOTION TO REMAND; (2) DENYING AS MMOT DEFENDANTS' MOTIONS TO DISMISS; AND (3) REMANDING THIS ACTION TO THE INDIA BRANCH OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF RIVERSIDE

The Court, the Honorable Robert J. Timlin, has read and considered Plaintiffs Myron Blackman and Paul Mediano's (collectively, "Plaintiffs") motion for remand of this case to Riverside Superior Court, Indio Branch, and Defendants AT&T

Corporation ("AT&T") and MCI Telecommunications Corporation's ("MCI") (collectively, "Defendants") separate oppositions thereto. The Court has also read and considered Defendants AT&T and MCI's separate motions to dismiss Plaintiffs' complaint, Plaintiffs' opposition, and AT&T and MCI's replies. Based on such consideration, the Court concludes as follows:

I.
BACKGROUND

On March 5, 1999, Plaintiffs commenced the present action by filing a complaint against Defendants in the Superior Court of the State of California in and for the County of Riverside ("Superior Court"). The complaint alleges that Defendants have added a cost to their telephone customers' bills which Defendants, by law (presumably federal) were supposed to bear themselves and that by doing so Defendants have violated California Business and Professions Code §§17200 and 17500 ("section 17200" and "section 17500").[1] The complaint alleges further that Defendants' customers, of which Plaintiffs are two, are being harmed by Defendants' failure to inform them of the true nature of the charges for

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[1]Section 17200 defines the "unfair competition" that a court may enjoin pursuant to California Business and Professions Code §§17203 and 17204. Pursuant to section 17200, "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising any act prohibited by [Business and Professions Code §§ 17500-17583]. " Section 17500 prohibits the making of certain false or misleading statements by business selling property or performing services.

which they are being billed. For relief, Plaintiffs do not explicitly seek damages but rather seek to enjoin--preliminarily and permanently--the complained of actions (i.e., Defendants' non-disclosure of the true nature of the charges being imposed on their customers). Plaintiffs also seek attorney's fees and costs and "such other and further relief as may be deemed just and proper."

On April 23, 1999, Defendant MCI removed the action to the United States District Court for the Central District of California.[2] In their notice of removal, Defendants contend that the Court has federal question subject matter jurisdiction over this action because Plaintiffs' claims for relief necessarily arise under federal law despite Plaintiffs' attempt to "artfully plead" only state law causes of action.' According to Defendants, Plaintiffs' claims are presented by the Federal Communications Act ("the FCA"), 47 U.S.C. §§ 151-614, and the relief which Plaintiffs seek may be had, if at all, only under the FCA. Plaintiffs move to remand the action to the Superior Court, contending in part that this Court lacks subject matter jurisdiction over the action. Defendants oppose Plaintiffs' motion to remand and have separately moved to dismiss this

[2]Defendant AT&T joined in the removal. Though Defendant MCI drafted the notice of removal setting forth the grounds on which removal was premised, the Court will attribute the contentions therein to both Defendants since AT&T joined in the removal and both parties have adhered in subsequent filings to the rationale contained therein.

action for failure to state a claim upon which relief may be granted.[3]

II.
ANALYSIS

In order for a federal court to have "arising-under" subject matter jurisdiction over an action, the action must "arise[] under the Constitution, laws, or treaties oft he United States." 28 U.S.C. § 133 I. This generally requires that the complaint set forth a claim for relief dependent upon an express or implied federal cause of action. The mere inclusion

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[3]A federal court must first assure itself of its own jurisdiction over the subject matter of the action beret, it may proceed to adjudicate any other issues involved in the action. See Cook v. Winfrey, 141 F.3d 322, 325 (7th Cir. 1998). Because the court ultimately concludes that it lacks subject matter jurisdiction over this action, it cannot address the other contentions raised in Plaintiffs' motion to remand and Defendants' motions to dismiss. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 118 S. Ct. 1003, 1012, 140 L. Ed. 2d 210 (1998) (quoting Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514, 19 LEd. 264 (1868)) ("'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause '"). Instead the Court will deny as moot Defendants' motions (and Defendant AT&T's request for judicial notice), without prejudice to their being brought in state court upon this action's remand. The Court notes however--since it is essential to its analysis here–that Defendant MCI argues in its motion to dismiss that the relief which Plaintiffs are seeking may only be had in an action before the Federal Commerce Commission ('FCC') brought pursuant to 47 U.S.C. § 208.

of a federal ingredient in what is otherwise a state law cause of action will not provide the basis for arising-under jurisdiction unless adjudication of plaintiff's claim for relief necessarily involves the resolution or a "substantial question of federal law in dispute between the parties." See Franchise Tax Bd. v. Construction Laborers Vac. Trust, 463 U.S. 1, 13, 103 S. Ct. 2540, 77 L. Ed. 2d 420 (1983). Thus, where a complaint identifies the causes of action on which the plaintiff bases her claim for relief, the analysis of whether arising-under jurisdiction exists generally begins and ends with an identification of the body of law creating the cause of action on which the plaintiff's claim for relief depends. See id. at 9-10. If state law creates the cause of action, there will be no arising-under jurisdiction (unless the "substantial question of federal law" exception is met). This is even where it is clear that the defendant will raise a federal defense to this cause of action (e.g., federal preemption) and the whole case will be determined by the availability or scope of this federal defense. See id. at 14. In contrast, if federal law creates the cause of action, there will be arising-under jurisdiction.

An exception to this general mode of analysis sometimes occurs in the context of removal. It has been held in this context that arising-under jurisdiction will exist where ptaintiff has "artfully pled" claims for relief premised solely on state-law causes of action despite Congress' complete preemption of the state law giving rise to the cause(s) of action on which the plaintiff relies. In such cases, courts have noted that "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." See id. at 22. Instead, where the prerequisite conditions arc met, a court will be able to look beyond the well-pleaded complaint to ascertain the true, federal nature of the claim and "recharacterize" it as

such. See Sullivan v. First Affiliated Sec., Inc., 813 F.2d 1368, 1372 (9th Cir. 1987).

The Ninth Circuit has cautioned that the "artful pleading doctrine" should only be used to recharacterize state law causes of action as federal "in exceptional circumstances as it raises difficult issues of state and federal relationships and often yields unsatisfactory results." See Hunter v. United Van Lines, 746 F.2d 635,641 (9th Cir. 1984). The doctrine also violates the principal that a plaintiff is master of her claims and, where state law causes of action are available, may plead only state law causes of action and ignore the federal ones. See id. Thus, the "artful pleading doctrine" has been limited to situations where Congress has expressed its intention to preempt completely a substantive area of state law and replace that area of law with a federal cause of action over which a federal district court has subject matter jurisdiction. See Parrino v. FHP, Inc., 146 F.3d 699, 704 (9th Cir. 19918); Rains v. Criterion Sys. Inc., 80 F.3d 339, 345(9th Cir. 1996); Holcomb v. Bingham Toyota, 871 F.2d 109, 111 (9th Cir. 1989); Ethridge v. Harbor House Restuarant, 861 F.2d 1359, 1403 (9th Cir. 1988); Heichman v. AT&T Co., 943 F. Supp. 1212, 1219 n.3 (C.D. Cal. 1995).

Where either complete preemption or the exisecnce of a substitute cause of at, on over which a federal district court has subject matter jurisdiction are absent, removal pursuant to the artful pleading doctrine is inappropriate and remand of the action to the state court from which it was removed is required. See Harbor House, 861 F.2d at 1397. For example, in Harbor House, the defendant removed an action from state court which it argued was preempted by sections 7 and 8 of the National Lahor Relations Act, 29U. S.C. §§ 157& 158. The district court

agreed, upheld removal, and dismissed the action, having concluded that the National Labor Relations Board ("NLRB") had exclusive jurisdiction over the claim for relief presented in the plaintiff's complaint. The Ninth Circuit reversed, however. It explained that the only actions which may be removed to federal court are ones thai could have been filed there in the first place. Yet, the action in issue could only be maintained before the NLRB. Thus, the federal district court lacked subject matter jurisdiction over the action and removal was improper. See id. And even though the state court also lacked jurisdiction over the action, the Ninth Circuit held that the action must be remanded to the state court so that the state coourt could determine the preemption issue on its own. See id. at 1 405. In short, "[t]he district cottrt lacked jurisdiction to dismiss the . . . complaint." Id.; cf. id. ("District courts may not take removal jurisdiction over a case within the NLRB's exclusive jurisdiction for the limited purpose of dismissing the case to protect the jurisdiction of the NLRB.").

In this action, it is Defendants' burden, as the parties who evoked the jurisdiction of the Court, to establish the Court's jurisdiction. See Gaus v. Miles- Inc., 980 F.2d 564, 566 (9th Cir. 1992). Defendints contend that the Court has arising-under jurisdiction over this action. Yet, Plaintiffs' complaint sets forth only state-law causes of action as bases for their claims for relief. Thus, the Court will lack arising-under subject matter jurisdiction over this action unless resolution of the dispute between Plaintiffs and Defendants will necessarily involve adjudication ora "substantial question of federal law in dispute between the parties," see Franchise Tax Bd., 463 U.S. at 13, or Congress has expressed an intention to preempt completely a substantive area of state law and replace that area of law with a federal cause of action over which a federal

district court has subject matter jurisdiction. See Harbor House, 861 F.2d at 1403. Defendants do not rely on the first exemption in any way. Instead, they assert that the Court has arising-under jurisdiction because Plaintiffs have artfully pled what is essentially a federal cause of action.[4]

The Court concludes, however, that Dcfcndants' removal of this action was improper for two reasons. First, Congress has not expressed an intention that the FCA completely preempt all state law causes of action. In fact, nearly cvery court which has addressed the precmpgve effect of the FCA with regard to actions such as Plaintiffs' has concluded that the preemptive effecl of the FCA is not complete. See Marcus v. AT&T Corp., 138 F.3d 46, 54 (2d Cir. 1998); See Housing Sys. Inc. v. Cable & Wireless, Inc., 12 F. Supp. 2d 688, 691-92 (N.D. Ohio 1998); Bauchelle v. AT&T Corp., 989 F. Supp. 636, 645 (D.N.J. 1997); Sanderson, Thompson, Ratledge & Zimmy v. AWACS, Inc., 958 F. Supp. 947, 958 (D. Del. 1997); Weinberg v. Sprint Corp., 165 F.R.D. 431, 440 (D.N.J. 1996); DeCastro v. AWACS. Inc., 935 F. Supp. 541, 548-55 (D.N.J. 1996); Esquivel v. Southwestern

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[4]Defendants argument seems to rely on what the Court considers to be a mischaracterization of the relief sought by Plaintiffs. Defendants contend that Plaintiffs are seeking to enjoin the actual billing of consumers for costs Plaintiffs maintain Defendants are supposed to assume themselves. The Court, however, reads the Plaintiffs' complaint as only seeking injunction which would require disclosure of the nature of the charges being imposed on Defendants' customers. Ultimately, the distinction is unimportant since it burden to establish the Court's subject matter jurisdiction and even accepting their characterization of Plaintiffs complaint, Defendants have failed to establish that the complaint contains a cause of action over which the Court can exercise arising-under jurisdiction.

Bell Mobile Sys., Inc., 920 F. Supp. 713, 716 (S.D. Tex. 1996); Heichman v. AT&T, 943 F. Supp. 1212, 1219-1222 (C.D. Cal. 1995). This is bccause the FCA contains a "savings clause" which states that nothing in the FCA "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of [the FCA] arc in addition to such remedies." 47 U.S.C. § 414.

More important, however, is the lack ora federal replacement cause of action over which this Court may exercisc arising-under subject matter jurisdiction. In fact, Defendant MCI maintains in its motion to dismiss that the relief which Plaintiffs are seeking may only be had in an action bcforc the FCC brought pursuant to 47 U.S.C. § 208. Thus, this case is exactly like the casc addresscd by the Ninth Circuit in Harbor House, in that the federal cause of action which Defendants maintain supplants the state causes of action on which Plaintiffs rely may only be brought before an administrative agency; it may not be brought in federal district court.

Accordingly, because Defendants have failed to establish a basis on which the Court may maintain subject matter jurisdiction over this action, the Court will grant Plaintiffs' motion for remand of this case to the Riverside Superior Court, Indio Branch. See Harbor House, 861 F.2d at 1405; 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.") (emphasis added).

III.
DISPOSITION

IT IS ORDERED THAT:

(1) Plaintiffs Myron Blackman and Paul Mediano's motion for remand of this case to the Riverside Superior Court, Indio Branch ("Superior Court") is GRANTED.

(2) Defendant MCI Telecommunications Corporation's motion to dismiss for failure to state a claim upon which relief may be granted is DENIED as moot, without prejudice to it being brought in Superior Court upon remand.

(3) Defendant AT&T Corporation's motion to dismiss (and request for judicial notice) is DENIED as moot, without prejudice to it being brought in Superior Court upon remand.

(4) This action, Myron Blackman and Paul Mediano v. AT&T Corporation and MCI Telecommunications Corporation, ED CV 99-142 RT (VAPx) is remanded to the Indio Branch of the Superior Court of the State of California in and for the County of Riverside.

DATED: March 3, 2000

/s/_____
ROBERT J. TIMLIN
United States District Judge

APPENDIX 6

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

[Filed February 8, 2001]

Case No. B131655
Supreme Ct. No. BC186787

MARCIA SPIELHOTZ et al.,	)
Petitioners,	)
	)
v.	)
	)
THE SUPERIOR COURT OF LOS ANGELES COUNTY,	)
Respondent; LOS ANGELES CELLULAR TELEPHONE COMPANY et al.,	)
Real Parties in Interest.	)
	)

PETITION for writ of mandate

Wendell Mortimer, Jr., Judge.

Filed February 8, 2001

Judges:CROSKEY, J.
We Concur: KLEIN, P.J., KITCHING, J.

Opinion by CROSKEY

OPINION

Petitioners Marcia Spielholz, Debra Petcove, and Wireless Consumers' Alliance, Inc. (collectively, Spielholz), sued Los Angeles Cellular Telephone Company and AT&T Wireless Services, Inc. (collectively, AT&T), alleging that AT&T falsely advertised a "seamless calling area" throughout Southern California and that it failed to disclose gaps or "dead zones" where wireless telephone users are unable to connect calls. AT&T moved to strike the allegations for monetary relief, based on title 47 United States Code[1] section 332(c)(3)(A), which provides that a state may not "regulate the entry of or the rates charged" by a wireless telephone service provider. It argued that for the court to award damages or restitution based on false advertising it must determine the value of the services provided, and that that determination would constitute rate regulation within the meaning of section 332(c)(3)(A) and therefore is expressly preempted. The trial court agreed and granted the motion.

Spielholz contends section 332(c)(3)(A) does not preempt a state court from awarding monetary relief based on false advertising. We agree.

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[1]All statutory references are to title 47 of the United States Code unless otherwise specified.

FACTUAL AND PROCEDURAL BACKGROUND

AT&T provides wireless telephone service to subscribers in the Los Angeles area. Marcia Spielholz and Debra Petcove are AT&T subscribers, and Wireless Consumers' Alliance, Inc., advocates on behalf of wireless telephone users.

Spielholz sued AT&T in February 1998 on behalf of herself and others similarly situated, alleging that it falsely advertised a "seamless calling area" of uninterrupted service throughout Southern California and failed to disclose the existence of gaps or "dead zones" within that area.[2] The second amended complaint filed in December 1998 alleges causes of action for unfair business practices, false advertising, violation of the Consumer Legal Remedies Act, intentional and negligent misrepresentation, breach of contract, and breach of the implied covenant of good faith and fair dealing.[3] Spielholz seeks injunctive and monetary relief, including damages and restitution.

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[2]Marcia Spielholz previously had sued Los Angeles Cellular Telephone Company in another action. A published opinion in that action held that a limitation of liability provision in the defendant's tariff filed with the Public Utilities Commission was enforceable. (*Los Angeles Cellular Telephone Co. v. Superior Court* (1998) 65 Cal. App. 4th 1013, 1017, 1019.) The incident in that action occurred before the effective date of federal preemption of California's rate regulations (*id.* at p. 1017, fn. 3), and the issues addressed in that opinion are unrelated to the present issues.

[3]Since the tort causes of action all arise from the alleged fraudulent advertising, we refer to them collectively as false advertising.

AT&T moved to strike the allegations for monetary relief in January 1999. It argued that although the complaint alleges false advertising, the gravamen of the complaint is that its rates are unreasonable, and the court would be required to determine the fair value of its services in order to award damages or restitution. Such a determination, it argued, would conflict with the federal statutory prohibition against state regulation of rates charged by wireless telephone service providers (§ 332(c)(3)(A)) and therefore is preempted. The court agreed and granted the motion in February 1999.

Spielholz petitioned this court for a writ of mandate, and we issued an alternative writ.[4] Wireless Consumers' Alliance, Inc., also petitioned the Federal Communications Commission (FCC) for a declaratory ruling on the preemption issue. We stayed the proceedings in this court pending resolution of the FCC petition. The FCC issued its opinion in August 2000, and we vacated the stay.

The FCC concluded that section 332(c)(3)(A) generally does not preempt an award of monetary relief by state courts based on state tort or contract claims, unless a court "purports to determine the reasonableness of a prior rate or it sets a prospective charge for services." (*In re Wireless Consumers Alliance, Inc.* (2000) 15 F.C.C.R. 17,021, ¶¶ 9, 38, 39.)

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[4]Although extraordinary relief ordinarily is not available at the pleading stage, mandamus is available when a trial court erroneously prevents a party from pleading a substantial part of its case and when extraordinary relief may prevent a needless and expensive trial and reversal. (*Taylor v. Superior Court* (1979) 24 Cal. 3d 890, 894, 157 Cal. Rptr. 693, 598 P.2d 854.)

Without purporting to rule on the specific allegations in this action, the FCC distinguished between "an outright determination of whether a price charged . . . was unreasonable," which would be preempted, and the determination of "whether . . . there was a difference between promise and performance" in the context of false advertising or breach of contract, which would not be preempted.[5] (15 F.C.C.R. 17,021 at ¶¶ 25-26.)

CONTENTIONS

Spielholz contends section 332(c)(3)(A) does not preempt a state court from awarding monetary relief based on false advertising.[6] AT&T contends an award of monetary relief would require the court to determine the reasonableness of the rates charged and therefore would constitute prohibited rate regulation within the meaning of section 332(c)(3)(A).

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[5]The FCC apparently is currently considering a motion for reconsideration of its opinion, and the opinion has been appealed to the District of Columbia Circuit Court of Appeals. In any event, the parties acknowledge that the FCC opinion does not purport to determine whether the specific allegations in this action are preempted and that the opinion may be persuasive but is not binding on this court.

[6]Spielholz challenges the trial court's order as to the tort causes of action only and states that she will dismiss the two contract causes of action.

DISCUSSION

1. *Standard of Review*

We review the order striking the allegations for monetary relief de novo, consider the allegations of the complaint as a whole, and assume their truth to determine whether they plead ultimate facts that would support a monetary award. (*Clauson v. Superior Court* (1998) 67 Cal. App. 4th 1253, 1255.) Specifically, our task is to determine whether section 332(c)(3)(A) preempts a state court award of monetary relief for causes of action based on false advertising.

Preemption is a legal issue involving statutory construction and the ascertainment of legislative intent, which we also review de novo. (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal. App. 4th 1807, 1812.)

2. *Preemption*

Congress has the power to preempt state law under the supremacy clause of the United States Constitution (art. VI, cl. 2). (*Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363 [147 L. Ed. 2d 352, 361].) Congress's intent to preempt may be expressly stated or implied where a federal law demonstrates an intent to "occupy the field" or a state law conflicts with a federal law. (*Ibid.*) A conflict exists where compliance with both state and federal law is impossible, or where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Ibid.*, quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67; *English v. General Electric Co.* (1990) 496 U.S. 72, 79.)

To determine whether Congress intended to preempt state law with respect to a particular activity, we focus on the nature of the activity that the state seeks to control or regulate rather than on the method of regulation adopted. (*San Diego Unions v. Garmon* (1959) 359 U.S. 236, 243.) Preemption therefore applies not only to positive enactments by legislation or regulation but also to judicial acts that interfere or conflict with congressional intent. (*Id.* at p. 247 [held that a damage award against labor unions was impliedly preempted as state regulation of union activity].)

Congress's intent to preempt must be "clear and manifest" to preempt state law in a field traditionally occupied by the states, such as the exercise of a state's police powers. (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485,; *California v. ARC America Corp.* (1988) 490 U.S. 93, 101.) This creates a presumption against preemption. (*Medtronic*, at p. 485; *ARC America Corp.*, at p. 101.) The states' police powers extend to consumer protection, such as claims based on false advertising, so the presumption against preemption applies in the present action. (*ARC America Corp.*, at p. 101; *Smiley v. Citibank* (1995) 11 Cal. 4th 138, 148, affd. (1996) 517 U.S. 735.)

3. *Section 332(c)(3)(A)*

Section 332(c)(3)(A) is part of the 1993 amendments to the Communications Act of 1934 (§ 151 et seq.). (Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, §6002(b)(2)(A) (Aug. 10, 1993), 107 Stat. 312, 393.) Under the Communications Act, common carriers engaged in interstate or foreign wire or radio communication must file with the FCC a schedule or "tariff" showing all charges and the classifications, practices, and regulations affecting those charges. (§ 203(a).)

The contents of the tariff are subject to FCC approval, and the FCC may determine and prescribe just and reasonable charges, classifications, practices, and regulations. (§§ 204(a), 205(a).) The 1993 amendments authorized the FCC to exempt wireless telephone service from the tariff filing requirement and the provision allowing the FCC to prescribe just and reasonable charges, classifications, practices, and regulations, provided that the FCC determined that those provisions were not necessary to ensure just and reasonable charges, classifications, practices, and regulations. (Pub.L. No. 103-66, § 6002(b)(2)(A), 107 Stat. at p. 393, codified in § 332(c)(1)(A).) The FCC so determined and ordered the exemption in 1994. (*In re Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order* (1994) 9 FCC Rcd 1411; see CFR § 20.15(c) (1999).)

Section 332(c)(3)(A) states that no state or local government may "regulate . . . the rates charged" by a wireless telephone service provider, but that a state may "regulate the other terms and conditions" of service.[7] It further provides that

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[7]Section 332(c)(3) states in relevant part: "(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to *regulate the entry of or the rates charged* by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from *regulating the other terms and conditions* of commercial mobile services. . . . Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that--P (i) market conditions with respect to such services fail to protect

a state may petition the FCC for authority to "regulate the rates" for service, and that the FCC shall grant the petition if market conditions do not adequately ensure just and reasonable rates. Subdivision (c)(3)(B) of section 332 provides that a state may petition the FCC for authority to continue any existing "regulation concerning the rates" for service, which the FCC must review under the same standard.[8]

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subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or P (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

"(B) If a State has in effect on June 1, 1993, any *regulation concerning the rates* for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. . . ." (Italics added.)

The statutory definition of "commercial mobile service" includes wireless telephone service providers. (See § 332(d)(1) & (2).)

[8]California petitioned the FCC in 1994 to continue the state's existing rate regulations. The FCC denied the petition in 1995. (*In re Petition of the People of the State of California and the Public*

The Communications Act also contains a saving clause that predates the 1993 amendments, stating "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (§ 414.)

4. *Express Preemption*

The question of whether section 332(c)(3)(A) expressly preempts an award of monetary relief in this action turns on the question of whether such an award would constitute rate regulation within the meaning of section 332(c)(3)(A) intended by Congress.

Rate regulation, or to "regulate . . . the rates charged" in the words of section 332(c)(3)(A), refers, in our view, to an action whose principal purpose and direct effect are to control prices. The term ordinarily refers to direct price controls of the sort that the 1993 amendments authorized the FCC to terminate for wireless telephone service providers by exempting them. In the context of amendments that allow the FCC to exempt providers from its authority to "determine and prescribe" (§ 205(a)) just and reasonable charges, we construe "regulate . . . the rates charged" (§ 332(c)(3(A)) to refer to the same sort of direct price controls. Thus, section 332(c)(3)(A) allows the FCC to discontinue its direct price controls and prohibits the

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Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates (1995) 10 FCC Rcd 7486.)

states from imposing their own. This meaning is "clear and manifest" (*Medtronic, Inc. v. Lour, supra,* 518 U.S. at p. 484; *California v. ARC America Corp., supra,* 490 U.S. at p. 101); the meaning advocated by AT&T is not.[9]

Section 332(c)(3)(A) does not disclose a congressional intent to preempt state court monetary awards that may require a determination of the value of services provided but do not *directly* regulate rates. We presume that if Congress had intended to preempt such state law remedies, it would have expressly so stated. Not only does the Communications Act not so state, but it states that it generally does not preclude state law remedies. (§ 414.) Courts have held that the saving clause preserves state law remedies for breaches of duties that are distinguishable from duties created under the act (*Kellerman v. MCI Telecommunications Corp.* (1986) 112 Ill. 2d 428 [493 N.E.2d 1045, 1051, 98 Ill. Dec. 24] [false advertising]; *Cooperative Communications, Inc. v. AT & T Corp.* (D.Utah 1994) 867 F. Supp. 1511, 1516 [unfair competition]; see *AT&T v. Central Office Telephone* (1998) 524 U.S. 214, 227 (*Central Office Telephone*) [the saving clause preserves only those rights that are not inconsistent with federal statutory requirements]), and we agree.

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[9] We find no ambiguity in the language "regulate . . . the rates" (§ 332(c)(3)(A)) in the context presented here, so it is neither necessary nor appropriate to consider the legislative history concerning "other terms and conditions" (§ 332(c)(3)(A)) that some courts have cited in support of their conclusion that the statute does not preempt state laws concerning false advertising and billing practices. (See, e.g., *Tenore v. AT & T Wireless Services, Inc.* (1998) 136 Wn.2d 322 [962 P.2d 104, 111]; *DeCastro v. AWACS, Inc.* (D.N.J. 1996) 935 F. Supp. 541, 552.)

A judicial act constitutes rate regulation only if its principal purpose and direct effect are to control rates. For example, an injunction that prevents a wireless telephone service provider from charging specified rates would directly regulate rates. (*Ball v. GTE Mobilnet of California* (2000) 81 Cal. App. 4th 529, 537-538; accord, *In re Comcast Cellular Telecom. Litigation* (E.D.Pa. 1996) 949 F. Supp. 1193, 1201.) Similarly, if a cause of action directly challenges a rate as unreasonable, an award of damages or restitution to compensate a customer for the difference between the rate paid and what the court determines to be a reasonable rate would directly regulate rates. (*Ball*, at pp. 537-538; accord, *Comcast*, at p. 1201.) In general, a claim that directly challenges a rate and seeks a remedy to limit or control the rate prospectively or retrospectively is an attempt to regulate rates and therefore is preempted under section 332(c)(3)(A); a claim that directly challenges some other activity, such as false advertising, and requires a determination of the value of services provided in order to award monetary relief is not rate regulation.

Ball v. GTE Mobilenet of California, supra, 81 Cal. App. 4th 529, *In re Comcast Cellular Telecom. Litigation, supra*, 949 F. Supp. 1193, and *Tenore v. AT & T Wireless Services, Inc., supra,* 962 P.2d 104 all involved the practice of billing in full minute increments, or rounding up to the next full minute, and other practices that resulted in charges for noncommunication time. The courts concluded that section 332(c)(3)(A) preempts claims that directly challenge the rate charged by a wireless telephone service provider (*Ball*, at pp. 537-538; *Comcast*, at p. 1201), but does not preempt claims alleging the failure to disclose a practice that affects the total amount charged (*Ball*, at p. 543; *Comcast*, at p. 1200; *Tenore*, at p. 115). They considered the billing increment to be an

integral part of the rate and therefore held that direct challenges to the reasonableness or legality of the billing increment were preempted, but claims based on the failure to disclose the billing increment were not preempted. (*Ball*, at pp. 537-538, 543;[10] *Comcast*, at pp. 1200, 1201; *Tenore*, at p. 115.)

We agree in principal with the distinction drawn in those cases between claims that directly challenge the rate charged and claims that challenge some other practice, such as false advertising. A monetary award based on the latter type of claim would affect the rate charged only incidentally and is not a direct price control or rate regulation. (See *Nader v. Allegheny Airlines* (1976) 426 U.S. 290, 299-300, discussed *post*.)

Based on the foregoing, we conclude that a claim that does not directly challenge the rate but directly challenges some other activity, such as false advertising, and seeks a remedy to limit or control that activity or seeks damages arising from the activity is not an attempt to regulate rates and is not expressly preempted under section 332(c)(3)(A). If the principal purpose and direct effect of a remedy are to prevent false advertising and compensate an aggrieved customer, any prospective or retrospective effect on rates is merely incidental.

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[10]The *Ball* court, in dictum, expressed apprehension as to whether the trial court could award monetary relief based on nondisclosure or could only order an injunction. (*Ball v. GTE Mobilenet of California, supra,* 81 Cal. App. 4th at p. 543.) It cited several cases (*ibid.*), but did not explain the reasons for its apprehension. Having reviewed those cases, we do not share the court's apprehension and perceive no obstacle to a monetary award in this action.

This is true even if the court determines the value of services provided in awarding damages or restitution. (Accord, *Tenore v. AT & T Wireless Services, Inc., supra,* 962 P.2d at pp. 112, 115.) Contrary to AT&T's argument, an award of damages or restitution for false advertising that requires the court to determine the value of services provided is not rate regulation. (*Ibid.*)

5. *Implied Preemption*

The existence of an express preemption provision and a saving clause does not necessarily negate the possibility of implied preemption (*Geier v. American Honda Motor Co.* (2000) 529 U.S. 1913 [146 L. Ed. 2d 914, 925-926), although they clearly weigh against implied preemption here.[11] The Communications Act does not evidence an intent to preempt monetary relief for state law causes of action based on false advertising.

The Communications Act does not address the issue of gaps or dead zones within a calling area, and there is no requirement that a calling area include gaps or dead zones or

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[11]The Supreme Court in *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 517, seemed to suggest that an express preemption clause forecloses any inquiry into implied preemption. It later clarified the holding, stating that it supported "at best . . . an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule." (*Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 288-289.) Its recent opinion in *Geier v. American Honda Motor Co., supra,* 146 L. Ed. 2d at pages 925-926, however, affirmatively states that an express preemption provision does not preclude implied preemption.

that the service provider fail to disclose their existence. Monetary relief under state law causes of action arising from the misrepresentation and nondisclosure of those conditions therefore would not conflict with any federal requirements. (See *Nader v. Allegheny Airlines, supra,* 426 U.S. at pp. 299-300, 304.)

The Communications Act also does not evidence an intent to "occupy the field" of either calling area continuity or false advertising. Although the act requires that charges, classifications, practices, and regulations be just and reasonable (§ 201(b)) and provides a right of action before the FCC or in federal court for violation of those requirements (§ 207), those provisions do not evidence an intent to preclude all other remedies within the broad ambit of a service provider's practices. A potential federal remedy is not necessarily inconsistent with state remedies, as acknowledged by the saving clause. We perceive no conflict.

Moreover, the availability of state law remedies is consistent with the 1993 amendments' objective to achieve maximum benefits for consumers and providers through reliance on the competitive marketplace, in which state law duties and remedies ordinarily are enforceable. (See *In re Wireless Consumers Alliance, Inc., supra,* 15 FCC Rcd 17,021, PP 22, 24.)

6. *The Filed Rate Doctrine*

AT&T contends we should construe the preemptive effect of section 332(c)(3)(A) by reference to the common law filed rate doctrine, as it has urged in similar cases in other jurisdictions, cited *post*. We reject this argument.

a. *The Doctrine and its Purposes*

The filed rate doctrine applies to companies that are required to file a tariff with a federal agency where the agency has the authority to determine whether the rates are just and reasonable. (*Arkansas Louisiana Gas Co. v. Hall* (1981) 453 U.S. 571, 577; *Marcus v. AT&T Corp.* (2d Cir. 1998) 138 F.3d 46, 58.) The doctrine holds that the only lawful rate is the filed rate and that only the agency can determine the reasonableness of rates. (*Arkansas Louisiana Gas Co. v. Hall*, supra, 453 U.S. at p. 577; *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.* (1951) 341 U.S. 246, 251-252.) The rates stated in the filed tariff are conclusive and cannot be invalidated or altered by judicial action. (*Arkansas Louisiana Gas Co.*, at pp. 578-579; 581-582.) The purposes of the filed rate doctrine are to preserve the agency's primary jurisdiction to determine the reasonableness of rates and to ensure rate uniformity and nondiscrimination among customers. (*Arkansas Louisiana Gas Co.*, at pp. 577-578; *Wegoland Ltd. v. NYNEX Corp.* (2d Cir. 1994) 27 F.3d 17, 19.)

Some courts have interpreted the filed rate doctrine to preempt not only claims that directly challenge the rates charged by regulated companies, but also claims that would require a court to determine the value of services provided in connection with a monetary award or would result in a rebate to selected customers. (See, e.g., *Day v. AT & T Corp.* (1998) 63 Cal. App. 4th 325, 339-340 [unfair business practices and false advertising]; *Marcus v. AT&T Corp.*, supra, 138 F.3d at pp. 60-62 [fraud].) AT&T cites these and similar cases and argues by analogy that they support a broad interpretation of the preemptive effect of section 332(c)(3)(A). We disagree. The purposes served by the filed rate doctrine, to preserve the

FCC's role in the ratemaking process and to ensure rate uniformity, would serve no purpose in an industry with no uniform, filed rates approved by the FCC. (Accord, *Tenore v. AT & T Wireless Services, Inc.*, supra, 962 P.2d at p. 110; *In re Wireless Consumers Alliance, Inc., supra*, 15 FCC Rcd 17,021, PP 19-22.[12]) Cases applying the filed rate doctrine therefore are distinguishable and inapplicable.

We now proceed to distinguish two cases applying the filed rate doctrine on which AT&T relies and discuss a third case that helps to illustrate our point.

b. *AT&T v. Central Office Telephone*

Central Office Telephone, supra, 524 U.S. 214, involved tort and contract claims related to AT&T's long distance telephone service, which is subject to the tariff filing requirement. (47 U.S.C. §§ 153(h), 203(a); *Central Office Telephone*, at p. 221.) The high court noted that in addition to showing the charges, a filed tariff also must show the classifications, practices, and regulations affecting those

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[12]In rejecting AT&T's argument, the FCC stated, "It appears that CMRS [commercial mobile radio service] providers have engendered much confusion over the issue of the applicability of the filed rate doctrine in cases concerning the preemptive effect of Section 332. For example, CMRS providers regularly cite filed rate cases to support their position, often without any acknowledgement that Section 332 cases do not involve filed rates. While some may admit that the filed rate doctrine does not apply, they urge that the same analysis be used in Section 332 cases without clarifying that Section 332 cases arise under a totally different regulatory regime." (*In re Wireless Consumers Alliance, Inc.*, supra, 15 FCC Rcd 17,021, P 15, fn. 47.)

charges (§ 203(a)), and that it is unlawful to extend any "privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges" except as specified in the tariff (§ 203(c)). (*Central Office Telephone*, at pp. 223-224.)

The court noted the purpose of the filed rate doctrine to ensure uniform, nondiscriminatory rates, stated that a discriminatory rate or privilege can take the form of a lower price for the same service or an enhanced service for the same price, and stated that rates "have meaning only when one knows the services to which they are attached." (*Central Office Telephone*, supra, 524 U.S. at p. 214.) In this context, it stated further that "Any claim for excessive rates can be couched as a claim for inadequate services and vice versa." (524 U.S. at p. 223.)

The plaintiff, a reseller of long distance telephone service, claimed that it was entitled to services and provisions other than those stated in the filed tariff, based on certain promises. (*Central Office Telephone*, *supra*, 524 U.S. at p. 220.) The court concluded that the additional services and provisions all pertained to matters that were "*specifically addressed* by the filed tariff" and were contrary to those terms, and that since the claims sought unlawful privileges contrary to the filed tariff they were preempted. (524 U.S. at pp. 224-226).

Thus, the court held that the filed rate doctrine bars a claim alleging entitlement to services on terms *contrary to the terms specified in the filed tariff*. It did not hold that any claim alleging inadequate services necessarily attacks the reasonableness of rates and therefore is preempted regardless

of whether the plaintiff seeks to impose service terms contrary to those specified in a filed tariff, as some courts have interpreted the opinion. (See, e.g., *Bastien v. AT&T Wireless Services, Inc.* (7th Cir. 2000) 205 F.3d 983, 988 (*Bastien*); *Bryceland v. AT & T Corp.* (N.D.Tex. 2000) 122 F. Supp. 2d 703, 709; *Naevus Intern. Inc. v. AT & T Corp.* (Sup. Ct. 2000) 185 Misc. 2d 655, 713 N.Y.S.2d 642, 645.) Nor did it hold or suggest that a claim that a provider misrepresented or concealed its service quality is actually a challenge to the reasonableness of rates and therefore is an attempt to regulate rates within the meaning of section 332(c)(3)(A), as AT&T now argues.

c. *Bastien v. AT&T Wireless Services, Inc.*

The Seventh Circuit Court of Appeals in *Bastien*, supra, 205 F.3d 983, 989-990, held that section 332(c)(3)(A) completely preempted the plaintiff's fraud and contract claims, for purposes of federal removal jurisdiction. It construed allegations that AT&T's infrastructure was inadequate to ensure quality service as a challenge to AT&T's right to enter the market on the terms approved by the FCC, including terms specifying coverage area and antenna power requirements. (*Bastien*, at pp. 988, 989-990, citing 47 C.F.R. §§ 24.103, 24.132, 24.232.) It held that section 332(c)(3)(A), stating that a state cannot "regulate the entry of or the rates charged" by a communications common carrier, expressly preempted such a challenge to the right of entry. (*Bastien*, at p. 989.) It further held that the generality of the plaintiff's misrepresentation and fraud allegations revealed that those claims were simply an attempt to recast the same challenge to AT&T's right of entry as state law claims, and therefore concluded that the

misrepresentation and concealment claims were preempted as well. (205 F.3d at pp. 989-990.)

The *Bastien* court also relied in part on the filed rate doctrine. It stated that the FCC had approved AT&T's rates for wireless telephone service (*Bastien*, supra, 205 F.3d at p. 984) and that the plaintiff's claims necessarily challenged the FCC's decision as to the reasonableness of the approved rates and therefore were preempted (*Id.* at p. 988). It regarded a challenge to service quality as an attack on the reasonableness of the approved rates, stating "As the Supreme Court recognized in *Central Office Telephone*, a complaint that service quality is poor is really an attack on the rates charged for the service and may be treated as a federal case regardless of whether the issue was framed in terms of state law." (*Bastien*, at p. 988, citing *Central Office Telephone*, supra, 524 U.S. at p. 223; see *Naevus Intern., Inc. v. AT & T Corp.*, supra, 713 N.Y.S.2d at p. 645, following *Bastien*.)

We disagree with the *Bastien* court's expansive interpretation of language from *Central Office Telephone* and do not believe that a challenge to service quality necessarily attacks the reasonableness of rates approved by the FCC, as discussed *ante*. Moreover, *Bastien* is distinguishable in that the court's holding was based on its conclusion that the FCC had approved AT&T's filed tariff for wireless telephone service; here it is undisputed that wireless telephone service providers in California are exempt from the tariff filing requirement. Since there is no tariff filing requirement, the filed rate doctrine is inapplicable.

We also reject AT&T's argument that Spielholz's allegations of misrepresentation and nondisclosure concerning

undisclosed gaps and "dead zones" should be construed as a challenge to the adequacy of its infrastructure, and that such a challenge conflicts with and undermines FCC requirements and therefore is preempted, as in *Bastien*. We construe the complaint liberally in connection with an attack on the pleading. (Code Civ. Proc., § 452.) The complaint adequately alleges several tort causes of action based on false advertising, and the allegations that AT&T's infrastructure is inadequate only support those causes of action; they do not defeat them.

d. *Nader v. Allegheny Airlines*

In *Nader v. Allegheny Airlines,* supra, 426 U.S. 290, the plaintiff challenged the defendant's fraudulent misrepresentation of its practice of overbooking flights, which resulted in "bumping" passengers from their reserved seats. (*Id.* at pp. 295, 296.) The Federal Aviation Act authorized the Civil Aeronautics Board to determine whether an air carrier had engaged in "unfair or deceptive practices," but a saving clause expressly preserved other statutory and common law remedies. (*Id.* at pp. 296, fn. 7, 298.) The high court concluded that the statutory scheme did not irreconcilably conflict with or preempt a state common law fraud action. (*Id.* at pp. 299-300.)

The court stated that the plaintiff's claim did not directly challenge the agency's ratemaking power and that any impact on rates resulting from the imposition of tort liability "would be merely incidental." (*Nader v. Allegheny Airlines,* supra, 426 U.S. at pp. 299-300.) It noted that the plaintiff did not challenge the reasonableness of an agency requirement or practice included within the filed tariff, since there was no agency or tariff requirement that air carriers overbook flights or that they fail to disclose the practice, and therefore

concluded that the filed rate doctrine did not apply. (*Id.* at pp. 299-300, 304.)

Similarly here, the Communications Act does not address the issue of gaps or dead zones within a calling area, and there is no FCC requirement that a calling area include gaps or dead zones or that the service provider fail to disclose their existence. Spielholz's claims do not challenge the reasonableness of an FCC requirement or practice included within a filed tariff, particularly since there is no filed tariff for wireless telephone service providers, and monetary relief would pose no irreconcilable conflict with federal law.

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to vacate its order granting AT&T's motion to strike and issue a new order denying the motion. The alternative writ of mandate issued on June 8, 2000, is discharged. Petitioners shall recover their costs in this proceeding.

CROSKEY, J.

We Concur: KLEIN, P.J.
KITCHING, J.